Supreme Court, U.S.
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No. —

IN THE
Supreme Court of the United States

ALLIED LOCAL AND REGIONAL MANUFACTURERS CAUCUS, SMILAND PAINT COMPANY, CONCO PAINT COMPANY,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented by this petition for writ of certiorari are:

(1) Whether the Environmental Protection Agency's interpretations as to how to implement the mandates of Section 183(e) of the Clean Air Act (a) to make scientific determinations about the compounds in products, (b) to establish regulatory criteria considering five factors, and (c) to list and schedule product categories for subsequent regulation, shall be judicially reviewed under the two-step approach of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), under which a court defers to an agency's reasonable interpretation of an implicit delegation of discretion, or the principles recently applied by this Court in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291 (2000), which holds that a Congressional delegation to an agency of discretion to make policy decisions of great magnitude must be explicit, and *Christensen v. Harris County*, 120 S.Ct. 1655 (2000), which holds that an agency interpretation of an inexplicit statute manifested in pronouncements which lack the force of law must be persuasive.

(2) Whether the Environmental Protection Agency had constitutional power under the Commerce Clause, as explicated in *Hodel v. Virginia Surface Mining and Reclamation Assn.*, 452 U.S. 264 (1981) or, alternatively, in *U.S. v. Lopez*, 514 U.S. 549 (1995) and *U.S. v. Morrison*, 120 S.Ct. 1740 (2000), to regulate pursuant to the rulemaking provisions of Section 183(e) the manufacture of architectural coatings for sale in the United States, in the absence of legislative findings that the subsequent use of such coatings will lead to the emission of organic compounds and their reaction with nitrogen oxides to form ozone pollution in states other than the state of usage.

RULES 14.1 AND 29.6 STATEMENT

Petitioner Allied Local and Regional Manufacturers Caucus is an unincorporated association of paint companies and trade groups. Its members include petitioner Smiland Paint Company, which manufactures in Los Angeles and distributes the "Morwear" line of paint products through several hundred retail dealers in the western United States and company-owned outlets in San Francisco and Napa, and petitioner Conco Paint Company, Smiland Paint Company's wholly-owned subsidiary, which distributes the "Conco•Pro" line through home center chains in the west and mid-west. None of the petitioners has a parent company or a non-wholly owned subsidiary. Respondent is the United States Environmental Protection Agency.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Allied Local and Regional Manufacturers Caucus ("Allied"), Smiland Paint Company ("Smiland"), and Conco Paint Company ("Conco") respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The opinion of the Court of Appeals, reported at 215 F.3d 61, is reproduced hereafter. Appendix ("App.") 1a-37a. The Court's order directing respondent Environmental Protection Agency ("EPA") to respond to petitioners' petition for rehearing and its order denying said petition are reproduced hereafter. App. 38a-39a.

JURISDICTION

The appellate decision was rendered June 16, 2000, and the order denying rehearing was filed October 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Commerce Clause of the Constitution provides in relevant part that "Congress shall have power . . . to regulate commerce . . . among the several states." U.S. Const. Art. I, § 8. Section 183(e) of the Clean Air Act ("CAA") is reproduced hereafter. App. 40a-44a. Section 59.400(a) of Subpart D of Part 59 of Title 40 of the Code of Federal Regulations, one of the EPA's three 1998 regulations under Section 183(e), provides in relevant part that its provisions "apply to each architectural coating manufactured . . . for sale or distribution in the United States."

STATEMENT OF THE CASE

In 1990 Congress enacted CAA Section 183(e), a major new regulatory program which is destined to impact thousands of products marketed by hundreds of industries and used by millions of consumers. Congress directed that, as a prelude to any regulation, EPA shall (1) make scientific determinations about the organic compounds in consumer and commercial products, (2) establish regulatory criteria considering five specific factors and, based on such determinations and criteria, (3) publish a list and schedule of subsequent product regulations. The statute is not explicit as to how EPA is to implement those three commands. EPA interpreted the statute in a 1995 report and notice so as to avoid most scientific determinations and establish criteria based primarily on non-statutory factors. The Court of Appeals upheld these expansive interpretations, applying the usual standards of review. Petitioners ask this Court to grant review and decide, instead, that Congress' claimed delegation of discretion had to be explicit and that EPA's interpretations had to be persuasive.

In 1998 EPA adopted the first three of 21 product regulations scheduled in the 1995 notice, one of which applies to all architectural coatings in the United States. The Court below, applying both this Court's pre-1995 and post-1995 Commerce Clause jurisprudence, ruled that EPA had constitutional power to so regulate based on general legislative findings that some activities emit volatile organic compounds which react with oxides of nitrogen and substantially affect commerce in a state other than the state where the activities occur. Petitioners pray that this Court review the ruling and hold EPA's paint rule unconstitutional, because no legislative findings establish that water-borne paints emit volatile compounds, solvent-borne paints emit reactive compounds, nor paints have effects on interstate commerce.

A. *Ozone Pollution, Organic Compounds, and Paints*

Ground-level ozone is a criteria pollutant for which EPA has issued national standards. 42 U.S.C. §§ 7408, 7409. Ozone is caused primarily by combustive emissions of oxides of nitrogen ("NOx"). Joint Appendix, Court of Appeals ("J.A.") 137-39, 173-99. At some times and places certain, but not all, organic compounds may also play an indirect role in ozone formation. *Id.*

The thousands of organic compounds contained in products differ significantly as to their volatility. Compounds of low volatility do not enter the air to any appreciable degree. J.A. 574.

The relative reactivities of individual organic compounds can also differ by more than an order of magnitude. J.A. 165-71, 391-93. Prior to 1990 EPA had exempted 23 compounds or classes of compounds from regulation as "negligibly" reactive pursuant to 40 C.F.R. § 51.000(s)(1), and by 1998 the list had grown to 44. 63 Fed. Reg. 48791, 48796, 48798 (Sept. 11, 1998); App. 14a-15a.

Architectural coatings contain about 1% by volume of all natural and man-made organic compounds. Those targeted for elimination by EPA's rule constitute about 2/10 of 1% thereof. 63 Fed. Reg. 48850, 48855.

Three species of glycol compounds are used extensively in water-borne paints. J.A. 812; App. 11a. Glycols are low-volatility species. J.A. 814.

Eight species of long-chain alcanes and cycloalcanes, referred to as mineral spirits, are used extensively in solvent-borne paints. J.A. 812; App. 11a. EPA acknowledges that emissions of mineral spirits are "less reactive" than other compounds. 63 Fed. Reg. 48797.

B. *Targeting Architectural Coatings Under Section 183(e)*

In 1990 Section 183(e), part of new Subpart 2 of Part D of the CAA, gave EPA authority in the area of direct regulation of products. 42 U.S.C. § 7511b(e). As a prelude to any such regulation, the statute directed EPA to make certain scientific determinations about the volatility and reactivity of compounds in products, establish regulatory criteria considering five specified factors, and publish a four-part list and schedule for the regulation of products.

EPA never formally identified glycols or mineral spirits as ozone precursors. See 42 U.S.C. § 7602(g). Nevertheless, long before publishing its 1995 report to Congress and its 1995 notice of its list and schedule, EPA had targeted architectural coatings for regulation under Section 183(e). 63 Fed. Reg. 48850.

By July 1994 EPA had developed six regulatory criteria supposedly based on the five factors specified in Section 183(e)(2)(B). It also developed a seventh criterion (emissions mass) and, later, an eighth (past or current regulatory activities) even though neither was so specified. EPA used one of its standing committee's advice to rank products under the first seven criteria, and later exercised the eighth criterion to establish a final ranking. J.A. 690-700, 705-710.

C. *1995 Report and Notice*

In March 1995 EPA submitted its report to Congress ("Report") purporting to contain its scientific determinations and regulatory criteria under Section 183(e). The manifest deficiencies of the Report are discussed below.

On March 23, 1995 EPA published a Notice containing its regulatory list and schedule ("Notice"). 60 Fed. Reg. 15264

(Mar. 23, 1995). The inadequicies of the Notice are discussed below.

D. *EPA Architectural Coatings Rule*

In 1996, EPA published the preamble and later the text of its proposed paint rule. 61 Fed. Reg. 32729 (June 25, 1996); 61 Fed. Reg. 46410 (Sept. 3, 1996). In 1998 EPA promulgated the final paint rule. 63 Fed. Reg. 48874 (Sept. 11, 1998).[1]

REASONS FOR GRANTING WRIT

I. THE CIRCUIT COURT APPLIED THE WRONG STANDARDS OF REVIEW TO EPA'S INTERPRETATIONS OF THE STUDY, CRITERIA, AND LISTING MANDATES OF SECTION 183(e).

A. *The First Step of the Court's Review Erroneously Assumed that Congress Made an Implicit Delegation of Discretion to EPA, and the Second Step Erroneously Assumed that the Court Must Defer if EPA's Interpretations Were Reasonable.*

This Court established the general principles under which the federal judiciary reviews an agency's interpretation of a

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[1] In 1996 EPA proposed a rule regulating the volatile organic compound content of 24 categories of consumer products. 61 Fed. Reg. 14531 (April 2, 1996). EPA targeted only those consumer products containing organic compounds with relatively high volatility and exempted those containing compounds of extremely low volatility. In 1998 EPA published the final rule regarding consumer products. 63 Fed. Reg. 48820 (Sept. 11, 1998). In 1996 EPA proposed a rule regulating the volatile organic compound content of automobile refinish coatings. 61 Fed. Reg. 19005 (April 30, 1996). In 1998 EPA published the final rule. 63 Fed. Reg. 48806 (Sept. 11, 1998). On September 11, 1998 EPA also made the Notice final. 63 Fed. Reg. 48792.

Congressional statute it enforces in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The now-familiar first step in a *Chevron* analysis is whether Congress has directly spoken to the precise question at issue. *Id.* at 842. The judiciary must reject administrative constructions which are contrary to clear congressional intent. *Id.* at 843 n. 9.[2] If the legislative "delegation" to the agency on the particular question is "implicit" rather than explicit, the court moves to the second step in the analysis. *Id.* at 843, 844. In applying the second step, a court may not substitute its own interpretation for a "reasonable" interpretation made by the agency. *Id.* at 844.

In the case at bar, the D.C. Circuit applied the *Chevron* standards. But, in two cases decided last term, this Court explicated important qualifications or exceptions to both steps, which should have governed here.

In *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, ____ U.S. ____ 120 S.Ct. 1291 (2000) the Court struck down FDA's interpretation of Sections 321, 353, and 393 of the Food, Drug, and Cosmetic Act, under which it had claimed authority to regulate the marketing of cigarettes. The Court, under *Chevron* step one, inquired whether Congress had directly spoken to the precise question at issue. *Id.* at 1300, 1314. It held that, in an "extraordinary" case, one which raises "important" or "major" questions (quoting Breyer, "Judicial Review of Questions of Law and Policy," 38 *Adm. L. Rev.* 363, 370 (1986)), deference is not appropriate if the agency claims that Congress intended an "implicit delegation" to fill the statutory gaps. *Id.* at 1314. Active judicial review is warranted where the agency claims that Congress implicitly delegated to it a policy decision of "economic and political" magnitude. *Id.* at 1301, 1315. Applying this principle, the Court held that Congress had

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[2] *See, e.g., Solid Waste Agency v. U.S. Army Corps of Engineers*, ___ U.S. ___, 2001 WL 15333 (Jan. 9, 2001).

clearly expressed its intent that FDA did not have the regulatory authority it claimed. *Id.* at 1297, 1300, 1301, 1315. It noted that the tobacco industry constituted "a significant portion of the American economy." *Id.* at 1315. It also noted FDA's "expansive" and "extremely strained" construction, as well as the "breadth" of the authority it claimed. *Id.* The Court was confident that Congress would not have intended to delegate implicitly such a far-reaching decision "in so cryptic a fashion." *Id.*[3]

Last term this Court also decided *Christensen v. Harris County*, ____ U.S. ____, 120 S.Ct. 1655 (2000), which explicates *Chevron* step two in certain situations. *Christensen* involved an interpretation of Section 207(o)(5) of the Fair Labor Standards Act by the Department of Labor. Nothing in the statute expressly prohibited a county from compelling employees to use compensatory time. *Id.* at 1660. The statute was silent. *Id.* at 1661. The Department argued that the Act implicitly barred this practice. *Id.* at 1660. This interpretation had been advanced in a Department opinion letter and it argued that such interpretation should be enforced based on deference to the reasonable basis therefor. This Court rejected the Department's position, holding that it was "unpersuasive." *Id.* at 1660, 1663. Instead, it held that the county had advanced a "better" reading. *Id.* at 1661. The Court reasoned:

> "Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not

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[3] The Court relied upon its earlier decision in *MCI Telecommunications Corp. v. America Telephone and Telegraph Co.*, 512 U.S. 218 (1994). *Id.* at 1301, 1315.

> warrant *Chevron*-style deference. [citations] Instead, interpretations contained in formats such as opinion letters are 'entitled to respect' . . . [citation], but only to the extent that those interpretations have the 'power to persuade;' [citation]" *Id.* at 1662-63.[4]

In the case at bar, the D.C. Circuit, declining to apply *FDA*, repeatedly concluded that nothing in Section 183(e) unambiguously reflected Congressional intent to limit EPA's discretion as to the means of carrying out its scientific determination, regulatory criteria, and product listing commands. App. 10a, 12a-13a, 16a, 27a. Then, ignoring *Christensen*, it repeatedly deferred to EPA's interpretations as to how to implement those mandates on the ground they were all reasonable. App. 7a, 10a, 12a, 15a-16a, 22a, 24a, 27a.

This case raises the exceptionally important questions of how the first step of *Chevron* should be applied, in light of *FDA*, to the threshold policy decisions of EPA which will affect hundreds of industries, and how the second step of *Chevron* should be applied, in light of *Christensen*, where EPA's interpretations were reflected in a report and a list and schedule. These questions should be answered before 21 massive product regulations affecting the entire economy are implemented.

B. *The Court Applied the Wrong Standards to EPA's Interpretations of Congress' Volatility Mandates*

As to the mandated scientific determinations, Section 183(e)(2)(A)(i) requires that EPA shall conduct a study of the "emissions" of "volatile" organic compounds "into" the air "from" products in order to determine their potential to

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[4] The Court cited several of its prior decisions. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 499 U.S. 244 (1991).

contribute to ozone non-attainment. The legislative history confirms this provision's obvious purpose, "to identify the products which emit VOCs, to estimate the contribution of different products" to ozone non-attainment. S. Rep. 101-228, 101st Cong., 2nd Sess. (1990), 1990 U.S.C.C.A.N. 3385 at 3434. EPA was to study "the causal relationship between emissions of individual species and ozone non-attainment." H.R. Rep. No. 101-490 at 251.

EPA's 1995 Report made the determination "collectively," and acknowledged that this approach was neither "rigorous" nor "robust." J.A. 526, 532. It conceded that "low volatility" compounds have "little propensity to enter" the air. J.A. 534. It noted that organic compounds with a vapor pressure more than 80 mmHg at 20° C were deemed "high volatility" compounds, and those below 0.1 mmHg at 20° C are too low in volatility to report. J.A. 545, 575. The Report focused on the volatility of consumer products, a broad category embracing 24,000 products, some of which were contained in one of the 21 categories listed for regulation, and others in one of the 15 expressly exempted. J.A. 517, 539-42, 570, 572-96. EPA said that consumer products often contain ingredients which are of "extremely low volatility (*i.e.*, some ingredients evaporate at such a low rate that they do not enter the air to any appreciable degree)" and are, thus, not reportable. J.A. 574. The Report did not discuss the volatility of glycols in architectural coatings. J.A. 570-71, 597-98, 600. Nor did it address relative volatility of any other compounds. J.A. 570-71, 597-619. The Report treats all organic compounds in products, except certain unreportable compounds in consumer products, as volatile, and equally so. EPA interpreted Section 183(e) to allow it to defer any volatility determinations until later individual rulemakings.

With respect to the mandate to establish regulatory criteria under Section 183(e)(2)(ii), Section 183(e)(2)(B)(iii) provides

that, in so doing, EPA shall take into consideration those products which "emit" highly reactive "volatile" organic compounds "into" the air.

The Report did establish a criterion including the word "[e]missions," but it made no effort to distinguish between products containing high volatility compounds and those containing low volatility compounds. J.A. 562.

As to the listing of product categories for regulation, Section 183(e)(3)(A) mandates that EPA shall list those products it determines, "based on" the mandated scientific determinations, account for at least 80% of "emissions . . . from" products. It further directs that EPA shall divide the list into four groups establishing priorities for regulation "based on" the criteria established as required.

In 1995 EPA published its Notice. Exempted from any regulation were 15 specified and numerous unspecified categories. 60 Fed. Reg. 15268. It listed 21 categories for regulation in four groups, including in group one architectural coatings, 24 sub-categories of consumer products, and autobody refinishing coatings. *Id.* at 15267. Again, these decisions were made without having determined whether, or to what extent, the compounds in the products exempted or to be regulated were volatile.

The Court of Appeals declined to discuss EPA's failure to deal with relative volatilities in purporting to carry out its scientific determination, regulatory criteria, and product listing mandates. App. 23a-24a.[5] The Court decided to

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[5] Rather than focus on what EPA failed to do in its Report and Notice as to all compounds, the Court focused instead on what EPA did in 1998. At that time, EPA discussed in its response to comments about the then three-year-old Report its test method for one class of compounds in one category of products. J.A. 723. It also discussed studies suggesting that such compounds eventually become available, but at an extremely slow rate. J.A. 729.

"defer" to EPA's three self-serving interpretations. *Id.* at 24a n.9. It found them to be "reasonable." *Id.* at 24a.

Congress did not explicitly grant EPA discretion to make determinations, establish criteria, and publish its list without reference to the volatility of any specific class of compounds and then, three years later, write responses to comments alluding to the volatility of one class of compounds. If Congress had intended to delegate to EPA the power to meet its commands in this belated and limited way, it did so implicitly. But the power to so make policy decisions of such scope and magnitude may not be deemed to have been delegated implicitly. *FDA*, 120 S.Ct. at 1301, 1314-15. The mandated ends of determining what products contain volatile compounds, establishing criteria for regulating these products, and listing products for regulation based on these determinations and criteria preclude the tardy and incomplete means EPA chose. Beginning a look at the volatility issue on a piecemeal basis three years after the study, criteria, and listing were over was simply too little, too late. Congress could not possibly have so intended.

Furthermore, EPA's interpretations of when and to what extent it must assess volatility were manifested, not in any formal rule or order, but in a report to Congress and lists of product categories to be exempted or regulated in the future. An agency's statutory interpretation reflected in such informal and non-legal documentation must be persuasive. *Christensen*, 120 S.Ct. at 1662-63. EPA's interpretations were hardly persuasive. It put the regulatory cart before the study, criteria, and listing horse. EPA listed the categories of products it would regulate and when it would do so, as well as some of those it would not regulate, in 1995 without having any way of knowing whether the products it listed for regulation or exempted were more or less volatile than others or, indeed, sufficiently volatile at all. This can not be reconciled with what Congress mandated.

C. *The Court Applied the Wrong Standards to EPA's Interpretations of Congress' Reactivity Mandates*

Section 183(e)(2)(A)(i) mandates that EPA shall conduct a study of the emissions of volatile organic compounds into the ambient air from products (or "any combination thereof") in order to determine "their" potential to contribute to ozone non-attainment. The legislative history makes clear that this command was intended to compel relative reactivity determinations. The reactivity factor was intended to help EPA "identify the relative contribution and importance" of each category. H.R.Rep.No. 101-490 at 253. As stated by one Congressman: ". . . [T]he language now emphasizes the importance of photochemical reactivity as a key criterion to be used by the Administrator in determining the categories of emissions to be listed." 136 Cong. Rec. at H2846 (May 23, 1990) (Rep. Luken).

EPA's Report admitted that the statute "requires" taking relative reactivities into account. J.A. 546. It acknowledged that "ideally" it "should consider the relative photochemical reactivity of individual species." J.A. 523. As to how to meet this requirement, EPA sub-divided the universe of organic compounds into three classes, two of which were at the extremes and small and one of which was in between them and massive. EPA had previously determined, under pre-existing regulations, 40 C.F.R. § 51.100(s), that a small group of organic compounds, some of which may be contained in products, are "negligibly" reactive. EPA also specified in the Report a second group of 10 compounds or classes of compounds as "highly" reactive. J.A. 552-53. The vast bulk of the compounds in products remained in a default group labeled simply as "reactive." EPA treated all such compounds "collectively," whether or not EPA had identified them as precursors of ozone under CAA Section 302(g). J.A.

526, 532. The Report conceded that this tripartite approach was neither "robust" nor "rigorous." J.A. 531, 532.

The Court below ruled, as to the *Chevron* first step, that the express references in the statute to "any combination thereof" and "their" rendered it "impossible to regard the statute as unambiguously expressing a Congressional intent that each VOC be analyzed individually." App. 10a. It also concluded that "nothing in Section 183(e) declares that the only way to 'determine' potential is through the agency's own studies." *Id.* at 12a.

Under *Chevron* step two, the Court ruled that certain statutory references supported the "reasonableness" of grouping virtually all compounds in one huge default class of "reactive" compounds. *Id.* at 10a. It held that EPA "reasonably" so interpreted the command in light of the statutory time frame. *Id.* at 11a. It found nothing "unreasonable" about EPA's failure to conduct its own tests. *Id.* at 12a. It acknowledged that petitioners' interpretation may be the "better" one, but held that it was bound to uphold EPA's interpretation even against a more reasonable interpretation. *Id.*

As to regulatory criteria, Section 183(e)(2)(B)(iii) mandates that, in establishing them, EPA shall consider those products which emit "highly reactive" compounds.

The Report considered this factor in establishing regulatory criteria simply by identifying 10 compounds or classes thereof as "highly" reactive. J.A. 552-53, 562-63. It admitted that the distinction between the massive default class of "reactive" compounds and the small class of "highly reactive" ones can only be made with "considerable arbitrariness." J.A. 552.

Applying the two steps of *Chevron*, the Court of Appeals held that EPA implemented the mandate to consider this factor in compliance with the statute. App. 7a-8a, 13a.

As to the listing of product categories to be regulated, Section 183(e)(3)(A) requires that EPA list those products which, "based on" the scientific study, account for at least 80% of emissions, "on a reactivity-adjusted basis," from products in non-attainment areas. It also directs that EPA shall divide the list into four groups "based on" the criteria established in the regulatory study.

In July 1994 an EPA advisory committee had completed scoring sheets to apply seven of the eight proposed criteria to 102 categories of products. J.A. 686-699. For example, architectural coatings as a group were given 3 of 5 points on one criterion because a few, but not many, coatings contain xylene, one of the 10 "highly" reactive compounds, but without any knowledge about the reactivity of mineral spirits, the principal compounds in solvent-borne paints. J.A. 704. The preliminary results of the committee's ranking placed autobody refinishing products fourth and architectural coatings fifteenth. Numerous categories of consumer products, not yet aggregated into one large group to be regulated and another large group to be exempted, were among the 102 categories ranked. J.A. 700-03. EPA published its Notice eight months later. EPA explained that it had "exercised" the eighth criterion, which was added in the Report to the seven criteria the committee had applied. 60 Fed. Reg. at 15266. EPA repeated that "ideally" it should have based its list and schedule on relative reactivity of individual compounds. *Id.* EPA simultaneously conceded in its Report that its adjustment methodology was "somewhat simplistic." J.A. 553. Nine months later EPA compiled its final ranking results. J.A. 705-10. It stated: "C7 x 4 weighted." J.A. 705. As a consequence of weighing the seventh criterion (mass) four times and exercising the eighth criterion (past or ongoing regulation), autobody refinishing products dropped from fourth to ninth in the rankings and architectural coatings rose from fifteenth to seventh. *Id.* No reactivity adjustment whatsoever had been effected for 62 of

the 102 categories. J.A. 705-10. The other 40 were adjusted for the presence of "highly" reactive compounds. For example, the architectural coatings category was adjusted upwards based solely on the xylene in a few such products. J.A. 704, 705.

As to *Chevron* step one, the D.C. Circuit disagreed that EPA's interpretation of how to implement the reactivity adjustment command was "inconsistent" with it. App. 14a. The Court ruled that "nothing in the [CAA] unambiguously requires the EPA to analyze the reactivity of each VOC on an individual basis." *Id.* at 16a.

Moving to the second step, the Court was "particularly deferential" to EPA in upholding the "reasonableness" of EPA's interpretation of the third reactivity mandate. *Id.* at 15a-16a. The Court dismissed concerns that EPA's interpretation would lead to over-regulation. As to the risk that some products which should have been exempted were being regulated, the Court regarded the risk as "not likely enough." *Id.* at 14a. As to the risk that some products were being regulated too soon, the Court treated it as of no "great moment." *Id.* at 15a.[6]

Again, for two reasons, the D.C. Circuit applied incorrect standards of judicial review of EPA's interpretations of how to carry out the three reactivity mandates. First, Congress did not explicitly empower EPA to identify a few outliers at one end of the spectrum as "negligibly" reactive and a few at the other end as "highly" reactive and treat the vast bulk of

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[6] As EPA had done, the Court in ignoring the concerns of erroneous regulation and premature regulation was necessarily guessing. And, of course, both EPA and the Court similarly had to ignore the equally probable but opposite risks of tardy regulation and erroneous exemption. Claims against the government which assert "over-enforcement" as well as "under-enforcement" of environmental statutes are both properly justiciable. *Bennett v. Spear*, 520 U.S. 154, 166 (1997).

widely-divergent compounds in between as simply "reactive," and equally so. Because the policy decision to use this distorted approach impacts so many products made and sold by so many industries, the Court erroneously permitted EPA to claim an implicit delegation by Congress. *FDA*, 120 S.Ct. at 1301, 1314-15.[7] Nor did Congress intend that EPA, in carrying out the third reactivity mandate, would, based on those 10, adjust for reactivity only 40 of the 102 categories it exempted or listed for regulation.

Second, EPA's interpretations of the three reactivity commands were not manifested in formal rules or orders adopted under administrative procedures and having the force of law, but in a report purporting to make scientific determinations and establish regulatory criteria and in a list and schedule of future product regulations. Accordingly, the Circuit Court should have imposed on EPA the burden of showing that its interpretations of the means of performing the reactivity mandates were persuasive. *Christensen*, 120 S.Ct. at 1662-63.

D. *The Court Appplied the Wrong Standards to EPA's Interpretations of Congress' Economic Cost Mandates*

Sections 183(e)(2)(B)(iv) and (v) direct that, in establishing regulatory criteria, EPA "shall take into consideration" those products which are subject to "the most cost-effective controls" and the availability of alternatives thereto which are of comparable "costs" considering health, safety, and environmental impacts.

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[7] Reasoned decision-making requires EPA to screen out non-serious from high-risk phenomena. *Chemical Manufacturers Assn. v. EPA*, 28 F.3d 1259, 1267-68 (D.C. Cir. 1994). It may aggregate members of a class of compounds only if their known similarities allow a reasonable inference of the presence of a common characteristic. *Dithiocarbamate Task Force v. EPA*, 98 F.3d 1394, 1399, 1405 (D.C. Cir. 1996).

The Report gave these requirements short shrift. EPA admitted it did not know the "cost" of alternative products. J.A. 564. Accordingly, it adopted other factors as a "surrogate" for the statutory factor. *Id.* Similarly, as to "the most cost-effective controls" factor, data were "unavailable." J.A. 566. Thus, EPA substituted a "matrix" of other factors. J.A. 567. EPA pledged that it will duly consider these factors "at the time of rulemaking." J.A. 524.

As to step one of *Chevron*, the Court held in conclusory fashion that EPA considered both factors by expressly including them in the wording of two of its regulatory criteria in the Report and applying those criteria in establishing priorities in the Notice. App. 25a-26a.

As to step two, the D.C. Circuit held that EPA "reasonably" considered the economic cost determination commands in establishing regulatory criteria. *Id.* at 25a-26a.

The Court's review of EPA's interpretations of how to implement these economic cost mandates was made under the wrong standards. For one thing, the future regulations EPA was establishing criteria for and listing were sure to impose trillions of dollars of costs on hundreds of industries and millions of consumers. There can be no implicit delegation of power to make policy decisions of such magnitude. *FDA*, 120 S.Ct. at 1301, 1314-15.

For another thing, the Report and Notice contained no legal mandate nor prohibition. Interpretations of inexplicit statutes reflected in such informal sources must be persuasive to survive judicial review. *Christensen*, 120 S.Ct. 1662-63.

E. *The Court Applied the Wrong Standards to EPA's Interpretations of Congress' Mandate To Consider Five Specified Factors*

Section 183(e)(2)(B) mandates that, in establishing the criteria for regulating products, EPA "shall take into consideration each of the" five enumerated factors.

EPA interpreted the statute as implicitly delegating to it the discretion to consider two non-statutory factors in establishing regulatory criteria, organic compound mass and prior or ongoing rulemakings. J.A. 567-69. Indeed, EPA gave dominate weight to these two non-statutory factors. The criterion based on mass was given quadruple weight. J.A. 705. And EPA "exercised" the criterion based on other rulemakings to identify which products should be listed. 60 Fed. Reg. 15266.

The D.C. Circuit upheld EPA's expansive construction. As to *Chevron* step one, the Court recognized the rule of *Motor Vehicle Manufacturers Assn. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) (an agency may not rely on factors which Congress has not intended it to consider). App. 7a, 17a, 26a-27a. But it said: "Nothing in section 183(e) suggests that Congress intended to limit EPA's consideration to the five factors specified in the statute." *Id.* at 27a.

As to step two, the Circuit Court ruled that EPA's inference that it was not barred from considering non-statutory factors was "reasonable." *Id.* It also concluded that the two factors on which EPA primarily relied, although not specified by Congress, were "reasonable." *Id.*

For two reasons, these were not the correct standards of review to apply to EPA's implementation of the regulatory criteria and listing mandates of Section 183(e).

First, EPA was establishing regulatory criteria to be applied to numerous future regulations affecting thousands of products made and sold by hundreds of industries. The power to base those criteria on factors other than those specified by Congress cannot be conferred by implicit delegation. *FDA*, 120 S.Ct. at 1301, 1314-15. Congress could not have intended that EPA establish criteria based primarily on mass when the words of Section 183(e), itself,

place primary focus on the volatility and the reactivity of the compounds to be targeted. Quality, not quantity, was the Congressional focus. Nor could it have intended that EPA simply rubber-stamp any rulemaking approaches regulators had followed before Congress' decision to make product regulation a part of the federal ozone control program. That program was founded on new concepts, including the scientific study, the regulatory criteria, and the product listing.

Second, EPA's interpretive reach was made, not in a formal rule nor order, but in the Report and Notice. Such interpretations are reviewed, not for reasonableness, but for persuasiveness. *Christensen*, 120 S.Ct. at 1662-63. The idea created by EPA and blessed by the Court—that Congress cared almost exclusively about compound mass and little about the volatility and reactivity properties thereof—lacks any persuasive power. As to other rulemakings, the Court thought is was "common sense" for EPA to list categories it could regulate "quickly." App. 27a. But EPA's interpretation was not persuasive, because Section 183(e) is crystal clear that substantive environmental and economic factors, not speed nor ease, are what count.[8]

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[8] EPA has no power to move to the rulemaking phase unless the necessary prerequisites are first performed. *Motor Vehicle Manufacturers Assn. v. Costle*, 647 F.2d 675, 677 (6th Cir. 1981); *Environmental Defense Fund v. EPA*, 852 F.2d 1316, 1320, 1326, 1331 (D.C. Cir. 1988); *Flue-Cured Tobacco Cooperative Stabilization Corp. v. EPA*, 4 F.Supp.2d 435, 462-63, 465-66 (M.D.N.C. 1998). Each regulation, including the architectural coatings rule, was, consequently, not in accordance with law and in excess of statutory authority and, therefore, should have been reversed under CAA Section 307(d)(9)(A) and (C).

II. EPA UNCONSTITUTIONALLY REGULATED THE MANUFACTURE OF PAINTS FOR SALE IN THE UNITED STATES WITHOUT EITHER CONGRESS OR EPA HAVING FOUND THAT THEIR SUBSEQUENT INTRASTATE USE WILL CAUSE COMPOUND EMISSIONS OR OZONE POLLUTION WHICH CROSS STATE LINES AND HAVE SUBSTANTIAL COMMERCIAL EFFECTS IN OTHER STATES

A. *EPA Lacked Constitutional Power Under this Court's Commerce Clause Jurisprudence in Effect Until 1995 to Regulate the Manufacture for Sale of Paints*

In the early days of federal clean air legislation, several lower courts addressed, in the context of the then-current Commerce Clause jurisprudence, the constitutionality of several such statutes. *U.S. v. Bishop Processing Co.*, 287 F.Supp. 624, 629-32 (D.Md. 1968), *affirmed* 423 F.2d 469 (4th Cir. 1970), *cert. denied*, 398 U.S. 904, (1970); *Pennsylvania v. EPA*, 500 F.2d 246, 259 (3rd Cir. 1974); *South Terminal Corp. v. EPA*, 504 F.2d 646, 677 (1st Cir. 1974).

In *Hodel v. Virginia Surface Minning & Reclamation Assn.*, 452 U.S. 264, 275-81 (1981), this Court rejected a facial challenge under the Commerce Clause to the Surface Mining Control and Reclamation Act. The Court added a passage stating that the Commerce Clause permits Congressionally authorized regulations of "activities causing air . . . pollution . . . that may have effects in more than one state," citing in a footnote as authorities supporting this proposition *Bishop*, *Pennsylvania*, and *South Terminal*. *Id.* at 282 n. 21.

The D.C. Circuit stated in the case at bar that the *Hodel* passage continues to have "validity" today, and assumed that

EPA's architectural coatings rule met the *Hodel* test in this case, which challenges EPA's application of Section 183(e) in its paint rule. App. 36a-37a.

This Court should decide what continued validity, if any, the early clean air cases and the *Hodel* passage and footnote have in such a case in light of this Court's Commerce Clause jurisprudence of the past five years, discussed in detail below. The proper approach is particularly important as to the three rules adopted in 1998, as well as the 18 more scheduled to be adopted thereafter pursuant to EPA's 1995 Notice.

If the *Hodel* passage and footnote apply to the multiple chemical-commercial causation chains covered by EPA's paint rule, the Court erred in upholding its constitutionality.

The "activities" regulated by EPA were those of manufacturing all paints for sale in the nation. It is undisputed that manufacturing and selling activities do not, themselves, have the effect of "causing" air pollution. Any "activities causing" air pollution, if paints cause it at all, which is highly doubtful, are the activities of using them—opening the can or pail, brushing, rolling or spraying the coating on an interior or exterior wall or surface of a structure, and letting it cure on the substrate. Any such use usually occurs long after and far away from the time and place of manufacture, or even that of the retail sale, and it is made by a person other than the manufacturer or retailer.

Even if Congress had authorized EPA to regulate the activity of using products, which Section 183(e) does not do, and even if EPA had regulated the use of paints, which it could not and did not do, three showings would have been required to establish a constitutional ground for such regulation under the *Hodel* test. Use of a product is an activity "causing" air pollution if and only if the compounds in that product are both volatile and reactive and if either any

organic compounds emitted or any ozone pollution formed cross a state line.

First, Congress or EPA would have to show that the glycols in the regulated water-borne paints were sufficiently volatile to be emitted from cans into the air upon usage. In 1990 Congress directed EPA to determine volatilities of the compounds in products. Scholars describe glycols in water-borne paints as "low volatility" compounds. J.A. 814. EPA's 1995 Report generally ducked the volatility issue. Its 1998 responses to comments about the Report discussed the method it uses (heating) to calculate any emissions from paints. J.A. 723. It also discussed studies showing the extremely slow volatilization of glycols from water-borne paints. J.A. 729.

Second, Congress or EPA would have to demonstrate that any organic compound, once up in the air, was sufficiently reactive to combine with NO_x to form ozone pollution. In 1990 Congress directed EPA to make such reactivity determination. EPA's 1995 Report declined to do so as to the vast bulk of compounds in products, including mineral spirits in solvent-borne paints. Indeed, in 1998 it acknowledged that such compounds are "less reactive" than others. 63 Fed. Reg. 48797.

The third showing the government would be required to make under the *Hodel* test, if it governs, is that any use of the products causing air pollution may have "effects in more than one state." Any effects the use of paints might cause would in many, if not most, instances occur in the state in which the product was manufactured, sold and used and, thus, be wholly intrastate. The intrastate use of paint would have commercial effects in another state only if either (a) any emissions of the compound traversed a state line, or (b) any ozone formed from a reaction between that compound and NO_x traversed a state line.

Neither Congress nor EPA made any of the three required showings as to any sale of any paint. Therefore, EPA's rule is unconstitutional under the *Hodel* test and the early cases it cited. The D.C. Circuit stated the *Hodel* test, but did not correctly apply it to EPA's paint rule. And, as shown in the next four sections, the D.C. Circuit also misapplied each of the four considerations this Court's post-1995 Commerce Clause jurisprudence has stood upon.

B. *The Court Misapplied the New Jurisdictional Element Consideration*

In *U.S. v. Lopez*, 514 U.S. 549 (1995) this Court declared unconstitutional under the Commerce Clause Section 922(q) of the Gun-Free School Zones Act of 1990. The Court ruled that the possession of firearms near a school is not an activity which "substantially affects" interstate commerce. *Id.* at 554. In so concluding, the Court applied four considerations. *Id.* at 559-64.

In *U.S. v. Morrison*, ____ U.S. ____, 120 S.Ct. 1740 (2000) which invalidated Section 13981 of the Violence Against Women Act, the Court described these four "significant considerations" as "the proper framework for conducting the required analysis" in such a case. *Id.* at 1749. It thereupon described the four *Lopez* considerations. *Id.* at 1749-51. Then, it applied these "principles underlying our Common Clause jurisprudence as reference points," to resolve the case before it. *Id.* at 1751, 1751-54.

The D.C. Circuit purported to apply the four considerations applied in *Lopez* and *Morrison* to the facts of this case. App. 34a-36a. It opined: "Not one of those considerations applies." *Id.* at 34a. As shown below, the Court erred in its application of each of the four considerations. This Court should review such applications, assuming the four considerations govern, in order to determine the constitutionality of EPA's paint rule, as well as to provide

needed guidance as to all similar product rules it has adopted or will adopt under Section 183(e).

One of the four considerations applied in *Lopez* was as follows:

> "§ 922(q) contains no jurisdictional element which would ensure through case-by-case inquiry, that the firearm possession in question affects interstate commerce . . . § 922(q) has no express jurisdictional element which might limit its reach to a discrete set of firearms possessions that additionally have an explicit connection with or effect on interstate commerce." 514 U.S. at 561-62.

The statute struck down in *Morrison* also contained no jurisdictional element, making clear an impermissible legislative election "to cast § 13981's remedy over a wider, and more purely intrastate, body" of activity. 120 S.Ct. at 1752.

The Court below stated that "EPA's regulation of VOCs is expressly limited to entities that act in interstate commerce," citing Section 183(e)(1)(C). As a statement of what the statute required, this was correct, as Section 183(e)(1)(C) authorizes EPA to regulate manufacturers of products for sale "in interstate commerce." But as a statement of what EPA's paint rule actually did, it was decidedly not correct, for that rule applies, much more sweepingly, to any paint manufactured for sale "in the United States." 40 C.F.R. § 59.400(a).[9]

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[9] The rule's application to paint manufactured for sale "in the United States" clearly exceeds EPA's statutory authority to regulate such transactions "in interstate commerce" only. This is confirmed by the canon that any ambiguity must be construed to avoid the Commerce Clause issue. *Lopez*, 514 U.S. at 562; *Jones v. U.S.*, ___U.S. ___, 120 S. Ct. 1904, 1909, 1911-12 (2000); *Solid Waste Agency*, 2001 WL 15333 (2000).

It is manifest that EPA's paint rule does not "ensure, through case-by-case inquiry," that any sale in question affects interstate commerce. *Lopez*, 514 U.S. at 561. It makes no effort to "limit its reach." *Id.* at 562. Instead, EPA openly cast its remedy over the widest possible body of activity, including all "purely intrastate" chemical-commercial causal chains. *Morrison*, 120 S.Ct. at 1752.

C. *The Court Misapplied the New Economic Activity Consideration*

Lopez analyzed the consideration of whether there was intrastate "economic" or "commercial" activity which substantially affects interstate commerce. In that case the fact that there had been preliminary economic activity in the past was constitutionally irrelevant. "Guns are . . . articles of commerce . . . . Their possession is the consequence either directly or indirectly of commercial activity." 514 U.S. at 602-03 (Stevens, J., dissenting). Indeed, the defendant had been paid $40 to deliver the gun to another student. *See U.S. v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993).

The question in *Jones* was whether, under 18 U.S.C. § 844(i), a private residence which had been used to secure an out-of-state mortgage loan, been covered by an out-of-state casualty insurance policy, and received natural gas from out-of-state suppliers is "used in . . . any activity affecting . . . commerce." This Court held that the statute did not so apply, saying: "That qualification is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce." 120 S.Ct. at 1910.[10]

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[10] The reach of the Commerce Clause is restricted ". . . in areas . . . where States historically have been sovereign." *Lopez*, 514 U.S. at 564. The restrictions operate with particular force in an "area . . . of traditional state concern." *Jones*, 120 S.Ct. at 1911. As the Court stated two days ago in *Solid Waste Agency*, 2001 WL 15333, Commerce Clause concern

The Court below said that "the same cannot be said" of Section 183(e)(1)(C), which permits regulation only of "manufacturers of products for sale." App. 35a.

The Court erred by focusing on the fact that painting a structure is the consequence of past economic activity. As in *Lopez* and *Jones*, the question was whether the intrastate event of direct concern, house painting, substantially affects interstate commerce.

D. *The Court Misapplied the New Legislative Findings Consideration*

In *Lopez*, no legislative findings had been made about the effects upon interstate commerce of gun possession in school zones. *Id.* at 562-63. Such findings would have enabled a court to "evaluate" any such legislative judgment. *Id.* at 563.

In *Morrison*, by contrast, the statute was supported by findings regarding the impact of gender-motivated violence on victims and their families. But the Court held that the existence thereof was "not sufficient, by itself," to uphold the statute. 120 S.Ct. at 1752.

In the case at bar, the Court below relied on the legislative history of the CAA amendments of 1990 in two respects. First, the Court noted that the legislative history "expressly describes . . . [ozone's] effects on the national economy." App. 35a-36a. In 1990 Congress made no findings that the glycols in water-borne paints are sufficiently volatile, nor that the mineral spirits in solvent-borne paints are sufficiently

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is "heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. [citation]." The Court noted that the rule invalidated there "would result in a significant impingement of the States' traditional and primary power over land and water use." The Court could have added air use. For more than two decades, products, including paints, have been primarily regulated by state clean air regulators. Even since 1990, air pollution control remains primarily the responsibility of the states. 42 U.S.C. §§ 7401(3), 7416, see also *id.* at §§ 7511b(e)(7),(9).

reactive, to warrant regulation and EPA's 1995 Report made no effort to fill those gaps. Second, the Court stated that the legislative history "expressly describes the problem of interstate transport of ozone." *Id.* But the history it cites does not relate to Section 183(e), let alone paints or the compounds they contain. Indeed, Congress dealt with the ozone transport problem in CAA sections other than 183(e). 42 U.S.C. §§ 7407(d)(1)(A)(i), 7506a, 7509a, 7511a(j), 7511c.

E. *The Court Misapplied the Causal Link Consideration*

Lopez rejected the government's arguments that possession of a gun in a school zone substantially affects interstate commerce because of crime costs, reduced travel, and a less well-educated populace. It disagreed that "Congress could regulate . . . all activities that might lead to violent acts, regardless of how tenuously they relate to interstate commerce." *Id.* at 564. It declined "to pile inference upon inference," as that would convert the limited Commerce Clause power into a general police power. *Id.* at 567.

Morrison noted that the "link" between the activity at issue and any substantial effect on interstate commerce may not be "attenuated." 120 S.Ct. at 1751. It rejected such "but-for reasoning." *Id.* It said that "the but-for causal chain must have its limits in the Commerce Clause area." *Id.* at 1753 n. 6.

The Court below held that there is "nothing attenuated" about the interstate effects of the activity at issue here. App. 36a. It cited three supposed commercial effects in other states.

First, it noted that paint products "are distributed nationally." *Id.* As discussed above, painting is a consequence of past distribution, much if not most of it intrastate. EPA's justification for regulating in attainment areas, which the Court cited, does not necessarily apply to

interstate commerce. 63 Fed. Reg. 48804. The Court further noted that paints are "then applied by end-users in multiple locations." App. 36a. But do-it-yourself painters apply paint in one location, and professional painters almost always operate in one state only.

Second, the Court referred to "the heavy impact ozone pollution has on national health care costs and national agricultural production." *Id.* This assumes that all paints are both volatile and reactive and, therefore, ozone precursors. But, of central importance in this challenge, neither Congress nor EPA ever so found. The best evidence in the record is to the contrary.

Third, the Court again noted the interstate nature of the "ozone transport phenomenon." *Id.* But the case it cited had nothing to do with paints, glycols, or mineral spirits, the subject of the challenged rule here.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: January 11, 2001

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT.

Nos. 98-1526, 98-1527.

ALLIED LOCAL AND REGIONAL MANUFACTURERS CAUCUS, *et al.*,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

NATIONAL PAINT & COATINGS ASSOCIATION, *et al.*,

Intervenors.

Argued Nov. 5, 1999.
Decided June 16, 2000.

Before: GINSBURG, TATEL, and GARLAND, Circuit Judges.

Opinion for the Court filed by Circuit Judge GARLAND.

GARLAND, Circuit Judge:

Petitioners in these consolidated cases challenge final regulations promulgated by the Environmental Protection Agency (EPA) to limit the content of volatile organic compounds in architectural coatings, including paints. The regulations were issued pursuant to section 183(e) of the Clean Air Act, which directs the agency to regulate emissions from consumer and commercial products to help achieve the national ambient air quality standard for ozone. Petitioners are Dunn-Edwards Corporation, a large paint manufacturer,

and Allied Local and Regional Manufacturers Caucus, an association of manufacturers and distributors of architectural coatings. Intervening on EPA's side are other industry groups--including the National Paint & Coatings Association, a trade association of some 400 paint and coatings manufacturers and distributors--which urge us to uphold the regulations.

Petitioners challenge the regulations on a multitude of grounds, including their asserted inconsistency with the Clean Air Act, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and the Commerce Clause. We conclude that EPA's regulations are lawful and deny the petitions for review.

I

The Clean Air Act, 42 U.S.C. §§ 7401 et seq., directs EPA to establish national ambient air quality standards for harmful air pollutants. See 42 U.S.C. § 7408(a). One of the pollutants so identified and regulated by the agency is ground-level ozone. See 40 C.F.R. § 50.9. Although in the upper atmosphere ozone occurs naturally and forms a protective layer that shields human beings from the harmful effects of the sun's ultraviolet rays, at ground level, man-made ozone can have a wide array of negative effects on human health, crops, and forests.[1] See EPA, STUDY OF

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[1] Reporting on the Clean Air Act Amendments of 1990, the Senate Environment and Public Works Committee explained the impact of ground-level ozone on human health: Ozone is fatal at high concentrations. At lower concentrations found in many urban areas in the United States, extensive research has shown that healthy adults and children begin to exhibit adverse health effects. These include chest pains, shortness of breath, coughing, nausea, throat irritation, and increased susceptibility to respiratory infections. Potentially more troubling and less well understood are the effects of long-term chronic exposure to summertime ozone concentrations found in many cities. Regular out-of-doors work or play during the hot, sunny summer months in the more

VOLATILE ORGANIC COMPOUND EMISSIONS FROM CONSUMER AND COMMERCIAL PRODUCTS, REPORT TO CONGRESS 1- 1 (1995) (J.A. at 518) [hereinafter REPORT].

S.REP. NO. 101-228, at 6 (1989); *see also* Consumer and Commercial Products: Schedule for Regulation, Final Listing, 63 Fed.Reg. 48,792, 48,793 (1998).

Section 183(e) of the Clean Air Act, added as part of the 1990 amendments to that Act, is aimed at mitigating the problem of ground-level ozone. See Clean Air Act Amendments of 1990, Pub.L. No. 101-549, § 183(e), 104 Stat. 2399, 2444-47 (codified at 42 U.S.C. § 7511b(e)). Ozone is formed when nitrogen oxides (NOx) react with volatile organic compounds (VOCs) in the presence of sunlight. See REPORT at 1-1 (J.A. at 518). Section 183(e) directs EPA to regulate emissions of VOCs from consumer and commercial products in order to help states achieve the national ambient air quality standard (NAAQS) for ozone.[2]

Section 183(e) contains a number of directions to EPA. First, it instructs the agency to "conduct a study of the emissions of volatile organic compounds into the ambient air from consumer and commercial products (or any combination thereof)" in order to "(i) determine their potential to contribute to ozone levels which violate the national ambient air quality standard for ozone" and "(ii) establish criteria for regulating consumer and commercial products." 42 U.S.C.

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polluted cities may cause biochemical and structural changes in the lung, paving the way for chronic respiratory diseases.

[2] The statute defines a "consumer or commercial product" as "any substance, product (including paints, coatings, and solvents), or article (including any container or packaging) held by any person, the use, consumption, storage, disposal, destruction, or decomposition of which may result in the release of volatile organic compounds." 42 U.S.C. § 7511b(e)(1)(B).

§ 7511b(e)(2)(A). The section further directs that the study be completed, and a report submitted to Congress, "not later than 3 years after November 15, 1990." *Id.*

Upon submission of the report, section 183(e) requires the EPA to "list those categories of consumer or commercial products that [it] determines, based on the study, account for at least 80 percent of the VOC emissions, on a reactivity-adjusted basis, from consumer or commercial products in areas that violate the NAAQS for ozone." *Id.* § 7511b(e)(3)(A). The statute then directs the agency "to divide the list into 4 groups establishing priorities for regulation" based on the criteria developed in the study. *Id.* Finally, the statute requires the EPA to regulate one group every two years until all four have been regulated. *See id.*

After passage of the 1990 amendments, EPA instituted a formal regulatory negotiation process, aimed at achieving consensus on the development of VOC regulations for paint and architectural coatings. Representatives of the affected industry were included on the negotiation committee. Complete consensus could not be reached, however, and the process was terminated in 1994. *See* National Volatile Organic Compound Emission Standards for Architectural Coatings, Final Rule, 63 Fed.Reg. 48,848, 48,850 (1998) [hereinafter Final Rule].

In March 1995, EPA submitted its statutorily-required report to Congress. The report concluded that "[c]onsumer and commercial products, while individually small sources of VOC emissions, contribute significantly to the ozone nonattainment problem." REPORT at 2-1 (J.A. at 523). VOC emissions from these products, the report said, constitute approximately 28% of all man-made VOC emissions. *See id.* at 2-8 (J.A. at 530). In compliance with Congress' direction, the report also set forth "criteria for regulating consumer and commercial products under tne

Act." *Id.* at 4-1 (J.A. at 557). The eight criteria listed by the agency were:

> (1) utility (2) commercial demand (3) health or safety functions (4) emissions of 'highly reactive' compounds (5) availability of alternatives (6) cost-effectiveness of controls (7) magnitude of annual VOC emissions (8) regulatory efficiency

Id. at 4-2 (J.A. at 558).[3]

In March 1995, EPA also published the statutorily-mandated list of categories of consumer or commercial products that together account for at least 80% of VOC emissions from such products in ozone nonattainment areas on a reactivity-adjusted basis. *See* Consumer and Commercial Products, Notice of Product Category List and Schedule for Regulation, 60 Fed.Reg. 15,264 (1995) [hereinafter Notice of Product Category List]. Per Congress' instruction, EPA divided those categories into four groups, establishing priorities for regulation. Architectural coatings were included in the first group, along with certain household consumer products and automobile refinish coatings. EPA determined that these three categories account for about 30% of the VOC emissions from all consumer and commercial products. *See* Consumer and Commercial Products: Schedule for Regulation, Final Listing, 60 Fed.Reg. 48,792, 48,793 (1998) [hereinafter Final Listing]. According to EPA, the architectural coatings category alone accounts for about 9% of the emissions from all consumer and commercial products, making it "one of the largest emissions sources among the consumer and commercial products categories." Final Rule, 63 Fed.Reg. at 48,850; *see* National Volatile Organic Compound Emission Standards for Architectural Coatings,

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[3] The first six criteria were derived from five factors specified in the statute. See 42 U.S.C. § 7511b(e)(2)(B). The last two were added by the agency. *See infra* Part IV.E.

Proposed Rule, 61 Fed.Reg. 32,729, 32,731 (1996) [hereinafter Proposed Rule]; REPORT at 2-6 (J.A. at 528).

In September 1998, EPA published its final rules and listing. As proposed, the agency listed architectural coatings, along with consumer products and automobile refinish coatings, in the first group of consumer and commercial product categories subject to regulation under section 183(e). *See* Final Listing, 63 Fed.Reg. at 48,792. At the same time, it issued a rule specifying limits on the permissible VOC content of products in each of the categories. *See* National Volatile Organic Compound Emission Standards for Automobile Coatings, 63 Fed.Reg. 48,806 (1998); National Volatile Organic Compound Emission Standards for Consumer Products, 63 Fed.Reg. 48,819 (1998); National Volatile Organic Compound Emission Standards for Architectural Coatings, 63 Fed.Reg. 48,848 (1998).

Petitioners Dunn-Edwards and Allied challenge EPA's initial study and report to Congress, as well as the list and rule that followed.[4] They assert that EPA has misinterpreted the Clean Air Act and that its regulations are arbitrary and capricious. By contrast, intervenor National Paint & Coatings Association, which, like Allied, participated in the unsuccessful attempt at regulatory negotiation, supports EPA's regulations, describing them as a "comprehensive set of reasonable limits that are tough but fair, and which can contribute significantly to ozone emissions reductions as mandated by the [Act]." NPCA Br. at 2-3.

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[4] Dunn-Edwards challenges EPA's decisions only insofar as they relate to architectural coatings. Although Allied's brief suggested a challenge to the consumer products and automobile refinish coatings rules as well, at oral argument counsel made clear that Allied's attack on those rules is identical to its attack on the architectural coatings rule. See Oral Arg. Tr. at 78-79.

II

In assessing petitioners' claim that EPA has misconstrued the statute, we are guided by the standards set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Under *Chevron's* first step, we ask whether Congress "has directly spoken to the precise question at issue," in which case we "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842- 43, 104 S.Ct. 2778. If "the statute is silent or ambiguous with respect to the specific issue," however, we move to *Chevron's* second step. *Id.* at 843, 104 S.Ct. 2778. Under step two, we must defer to the agency's interpretation so long as it is "based on a permissible construction of the statute," *id.*, and is "reasonable in light of the Act's text, legislative history, and purpose," *Southern Cal. Edison Co. v. FERC*, 116 F.3d 507, 511 (D.C.Cir.1997).

As petitioners note, we also have the power to set aside a final rule promulgated under the Clean Air Act if the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A). To determine whether EPA's rules are "arbitrary and capricious," we apply the same standard of review under the Clean Air Act as we do under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A). *See Ethyl Corp. v. EPA*, 51 F.3d 1053, 1064 (D.C.Cir.1995); *Chemical Mfrs. Ass'n v. EPA*, 28 F.3d 1259, 1263-64 (D.C.Cir.1994). In that regard, we look for guidance to *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). Under the standard set forth in that case, we must affirm the EPA's rules if the agency has considered the relevant factors and articulated a " 'rational connection between the facts found and the choice made.' " *Id.* at 43, 103 S.Ct. 2856 (quoting *Burlington Truck*

Lines v. United States, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962)).

In the following parts, we apply these standards to petitioners' challenge to the architectural coatings rule and related EPA decisions.

III

Petitioners' principal argument is that the Clean Air Act requires EPA to regulate VOCs according to their "reactivity," and that EPA failed to do so. "Reactivity," as defined by petitioners, is " 'the amount of ozone formed per unit amount . . . of VOC added [to a given atmospheric mixture].'" Dunn-Edwards Br. at 3 n.4 (quoting NATIONAL RESEARCH COUNCIL, RETHINKING THE OZONE PROBLEM IN URBAN AND REGIONAL AIR POLLUTION 153 (1991) (J.A. at 165)) (alterations in original). In petitioners' view, EPA ignored reactivity and instead regulated VOCs according to their "mass"—i.e., according to the amount of VOCs contained in a product.

In this blunt form, petitioners' attack on the EPA is factually incorrect. As the EPA notes, it did "consider[ ] reactivity in prioritizing and selecting product categories to be listed for regulation." Final Listing, 63 Fed.Reg. at 48,795. It did so by using available reactivity data to divide VOCs into three groups: negligibly reactive, reactive, and highly reactive. *See id.*

EPA designated as negligibly reactive those compounds the data showed to have insignificant ozone-forming potential. *See id.* To make that designation, EPA relied on data derived from the "method now normally used for identifying negligibly reactive VOC," the so-called "kOH method." REPORT at 3-4 (J.A. at 549). "kOH reactivity data," the agency said, "have been obtained or estimated for nearly all VOC species of interest." *Id.* at 3-5 (J.A. at 550); *see also id.* at 3-4 (J.A. at 549) (describing kOH method).

Compounds determined to be negligibly reactive on the basis of that data were excluded altogether from the VOC emissions inventory and from the related regulations. *See* Final Listing, 63 Fed.Reg. at 48,795.[5]

To differentiate between the remaining reactive VOCs, EPA included data derived from the "Incremental Reactivity" method, a method "more appropriate for rating reactive VOC." REPORT at 3-4 (J.A. at 549). EPA used this data to identify ten classes of VOCs that are highly reactive under most conditions. *See* Final Listing, 63 Fed.Reg. at 48,795-96. The agency then identified the product categories known to contain these highly reactive compounds, and estimated the quantity of highly reactive compounds emitted by those product categories. *See id.* at 48,796. Finally, EPA adjusted the mass emissions figures for those product categories by applying a reactivity adjustment factor to the mass emissions of their highly reactive VOCs. *See id.*

Petitioners recognize that EPA did, at least in this tripartite categorical form, regulate according to reactivity. Their contention is that this is not enough. Rather, petitioners urge that the statute requires EPA to determine the reactivity of each individual VOC species, and to use each VOC's relative reactivity in promulgating the final regulations. Petitioners' argument is based on their analysis of three provisions of the Clean Air Act.

A

Section 183(e) of the Clean Air Act directs EPA "to conduct a study of the emissions of volatile organic compounds into the ambient air from consumer and commercial products (or any combination thereof) in order to—(i) determine their potential to contribute to ozone levels

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[5] EPA labeled a compound negligibly reactive if its kOH value was lower than that of ethane. See REPORT at 3-5 (J.A. at 550).

which violate the national ambient air quality standard for ozone. . . ." 42 U.S.C. § 7511b(e)(2)(A). Petitioners contend that the phrase "potential to contribute" as used in this provision is synonymous with the term "reactivity."

Accepting petitioners' contention that the Clean Air Act requires a determination of reactivity, however, does not resolve the question of whether reactivity must be determined on an individual VOC-by-VOC, rather than categorical, basis. Allied contends that the above-quoted provision requires EPA to determine the reactivity of "each" volatile compound. *See* Allied Br. at 14. Had Congress used the word "each" in the statute, the first step of the *Chevron* test might well dictate victory for Allied. But Congress did not use that word. Instead, it directed EPA to study emissions of volatile organic compounds "from consumer and commercial products (or any combination thereof) in order to . . . determine their potential to contribute to ozone levels." 42 U.S.C. § 7511b(e)(2)(A) (emphasis added). The express reference to "any combination thereof," and the direction to determine "their potential" rather than "each's potential" (or even, "their potentials"), renders it impossible to regard the statute as unambiguously expressing an intent that each VOC be analyzed individually. To the contrary, and moving to the second step of the *Chevron* test, these references support the reasonableness of EPA's contention that Congress authorized the agency to proceed on a category-by-category basis.

EPA's reading of the statute is further supported by the provision requiring EPA to complete its study and submit its report within three years. *See id.* Relatively little data is currently available on the comparative reactivity of individual VOC species. *See* REPORT at 2-10, 3-5 (J.A. at 532, 550) (noting that Incremental Reactivity data is only available for "some 328 VOC species or groups of species"). According to EPA's figures, not seriously contested by petitioners, a detailed reactivity study of a single VOC species would take

two months to accomplish. *See* EPA, Response to Comments on Section 183(e) Study and Report to Congress 2-75 (1998) (J.A. at 740) [hereinafter Response to Comments]. As "there are approximately 1,000 different VOC species associated with the architectural coating industry alone," *id.*, EPA estimates that a truly species-specific analysis of reactivities would require 166 years of testing. Accordingly, EPA reasonably concluded that in light of the three-year statutory timetable, Congress could not have expected it to proceed on a species-specific basis.

In reply to this argument, Dunn-Edwards suggests that EPA could have streamlined the task by confining its analysis to the smaller universe of those VOCs most commonly found in architectural coatings. "EPA need not," Dunn- Edwards says, "have determined the reactivity of every VOC." Dunn-Edwards Reply Br. at 6. Instead, a "reactivity-based regulation could be implemented using information on only the three VOCs accounting for almost all emissions from waterborne architectural coatings and the eight VOCs accounting for almost 80% of emissions from solventborne architectural coatings." *Id.* at 6. Individual analyses of just those eleven, Dunn-Edwards argues, could readily have been completed within the statutory timetable.

This reply has two problems. First, Congress directed EPA to study and regulate the VOC emissions from all "consumer or commercial products," not only from architectural coatings. While the streamlined approach Dunn-Edwards suggests might accomplish the task for the product category of principal concern to petitioner, that does not answer EPA's contention that the agency would still have been unable to meet the statutory deadline across the board.

Moreover, and more important, in making this suggestion Dunn-Edwards effectively abandons the purity of the argument it predicated on *Chevron* step one. By contending that EPA could have accomplished its task within the time

available by studying only eleven of the VOCs contained in architectural coatings, Dunn-Edwards must accept that the statute does not require a separate evaluation of each VOC's individual reactivity. And if the statutory language permits the agency to regulate by analyzing only the eleven most significant VOCs, it is hard to see why it bars EPA from instead taking the analytical approach it preferred: excluding from regulation those VOCs with negligible reactivity, giving regulatory priority to product categories containing the ten classes of most highly reactive VOCs, and regulating the balance of reactive compounds according to the mass of their emissions. It may be, as petitioners contend, that theirs is the better approach; but that is not a question for this court. Under *Chevron*, we are bound to uphold agency interpretations as long as they are reasonable—"regardless whether there may be other reasonable, or even more reasonable, views." *Serono Lab., Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C.Cir.1998).

Finally, Dunn-Edwards implicitly suggests that EPA was unfaithful to section 183(e)(2)(A) because, rather than "determine [VOCs'] potential to contribute to ozone levels" by doing its own testing, the agency relied on a review of the existing scientific literature. *See* Dunn-Edwards Br. at 12. But nothing in section 183(e) declares that the only way to "determine" potential is through the agency's own studies—something Congress did demand in other sections of the Clean Air Act. *See, e.g.*, 42 U.S.C. § 7511f (directing EPA to study the role of ozone precursors in tropospheric ozone formation, and commanding that the "Administrator shall utilize all available information and studies, as well as develop additional information, in conducting the study required by this section") (emphasis added). Nor is there anything unreasonable about the agency's conclusion that it could "determine" VOCs' potential to contribute by examining data in the existing literature. To the contrary, "EPA typically has wide latitude in determining the extent of

data-gathering necessary to solve a problem. We generally defer to an agency's decision to proceed on the basis of imperfect scientific information, rather than to 'invest the resources to conduct the perfect study.' " *Sierra Club v. EPA*, 167 F.3d 658, 662 (D.C.Cir.1999) (quoting *American Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1004 (D.C.Cir.1997)).

B

As a second source of statutory support for their argument that the Clean Air Act requires a VOC-specific approach, petitioners note that in establishing "criteria for regulating consumer and commercial products," Congress directed EPA to take into consideration "[t]hose consumer and commercial products which emit highly reactive volatile organic compounds into the ambient air." 42 U.S.C. § 7511b(e)(2)(B)(iii). But EPA expressly complied with this congressional command, adopting as one of its criteria "emissions of highly reactive compounds." *See* REPORT at 4-6 (J.A. at 562). As noted above, the agency implemented this criterion by identifying ten classes of VOCs as "highly reactive," and using that classification to give priority to consumer and commercial products that emitted those highly reactive compounds. *See* Final Listing, 63 Fed.Reg. at 48,796. Accordingly, this statutory citation does not add to the weight of petitioners' challenge.

C

Finally, petitioners note that section 183(e)(3)(A) requires EPA to "list those categories of consumer or commercial products" that "account for at least 80 percent of the VOC emissions, on a reactivity-adjusted basis, from consumer or commercial products in areas that violate the NAAQS for ozone." 42 U.S.C. § 7511b(e)(3)(A). EPA is then directed to "divide the list into 4 groups establishing priorities for

regulation," and to regulate one group every two years until all have been regulated. *Id.*

To comply with these requirements, EPA first used the methodology we have described above: it divided VOCs into three sets, exempting those with negligible reactivity and applying an (upward) reactivity adjustment factor to the mass emissions of products with highly reactive ingredients. After ranking product categories based on eight regulatory criteria, *see supra* Part I, EPA developed the required list of regulated categories by starting with the highest ranked category and proceeding through successive categories until the list accounted for 80% of the emissions, adjusted for reactivity. *See* Final Listing, 63 Fed.Reg. at 48,796. The agency identified architectural coatings as "one of the largest sources of VOC emissions among categories of consumer and commercial products," *id.* at 48,797, and therefore included it within the first group of regulated categories.

Because EPA did not evaluate each VOC's individual reactivity, petitioners contend that "products containing less-reactive compounds were included in an early group when, instead, they should have been exempted or regulated, if at all, in later stages." Allied Br. at 20. Petitioners argue that these two possibilities—that some compounds were regulated that should have been exempted, and that architectural coatings as a category were given priority regulation when they should have been regulated in one of the later groups—render EPA's methodology inconsistent with the statute's command to account for VOC emissions "on a reactivity-adjusted basis." We disagree.

First, the possibility that some compounds that were regulated should not have been regulated at all is not likely enough to undermine EPA's methodology. As explained above, EPA expressly exempted from regulation those compounds determined to have negligible reactivity. Moreover, pre-existing EPA regulations allow companies to

apply to have a compound excluded from the definition of VOC, and thereby exempted from regulation, based on evidence that it is negligibly reactive. *See* Final Listing, 63 Fed.Reg. at 48,798 (citing 40 C.F.R. § 51.100(s)). Working with industry, EPA has exempted more than 100 VOC species (42 compounds and 2 classes of compounds) under this provision. *See* RESPONSE TO COMMENTS at 2-90 (J.A. at 755); Final Listing, 63 Fed.Reg. at 48,798. Since data necessary to determine negligible reactivity are available for "nearly all VOC species of interest," REPORT at 3-5 (J.A. at 550), and since even petitioners concede that all VOCs have some potential to contribute to ozone formation, *see* Oral Arg. Tr. at 27; *see also* Final Listing, 63 Fed.Reg. at 48,797, petitioners' challenge does not cast doubt on EPA's regulatory process.

Nor is the second possibility, that in a perfect regulatory world architectural coatings would not be in the first group of regulated products, of great moment in evaluating the reasonableness of EPA's method of regulation. There is no serious argument that architectural coatings would not appear somewhere on even a perfect regulatory list, given their status as one of the largest sources of VOC emissions among consumer and commercial products. Indeed, section 183(e) directs the EPA to list those categories of consumer or commercial products that account for "at least" 80% of VOC emissions on a reactivity-adjusted basis—implying that it could list categories accounting for 100% of such emissions. As to exactly where on that list architectural coatings should have ranked, we can only say what we have repeatedly said before: An "agency is entitled to the highest deference in deciding priorities among issues, including the sequence and grouping in which it tackles them." *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1039 (D.C.Cir.1987); *see Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C.Cir.1987). Moreover, we must be particularly deferential in a case like this, where Congress—by instructing EPA to set priorities

using multiple, nondeterminative criteria[6]—has necessarily indicated an intention to delegate substantial discretion to the agency.

In sum, we conclude that nothing in the Clean Air Act unambiguously requires the EPA to analyze the reactivity of each VOC on an individual basis, and that EPA's more categorical approach is a reasonable interpretation of the reactivity-related requirements of the Act. Accordingly, the architectural coatings rule survives review under the standard set by the Supreme Court in *Chevron*.

D

Petitioners contend that even if the Clean Air Act does not require EPA, as a matter of statutory construction, to regulate VOCs based on an analysis of their relative individual reactivities, the agency must nonetheless do so to avoid regulating in an arbitrary and capricious fashion. As petitioners note, EPA's own report conceded that: "[t]o be the most effective, ozone control strategies ideally should be based not only on mass VOC and NOx emissions but should consider the relative photochemical reactivity of individual species." REPORT at 2-1 (J.A. at 523); *see also* Notice of Product Category List, 60 Fed.Reg. at 15,266. The key words in the quoted sentence, however, are "to be the most effective" and "ideally." Indeed, in the sentence following the one just quoted, EPA went on to state:

> Reactivity data on VOC, especially those compounds used to formulate consumer and commercial products, is extremely limited. Better data, which can be obtained only at great expense, is needed if the EPA is to consider relative photochemical reactivity in any VOC control

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[6] Congress directed EPA to establish regulatory priorities based on criteria which "take into consideration" at least five listed factors. 42 U.S.C. § 7511b(e)(2)(B); *see also supra* note 3; *infra* Part IV.E.

> strategy. In the meantime, a practical approach is to act on the basis of mass VOC emissions.

REPORT at 2-1 (J.A. at 523). In short, the agency concluded that the methodology it adopted, and which we have described above, was the "most appropriate way to meet the statutory requirements, given the limitations and uncertainties surrounding the reactivity issue." REPORT at 3-10 (J.A. at 555).

Our role, of course, is to determine neither whether EPA's approach was "ideal," nor whether it was the "most appropriate," but only whether it was reasonable. *See Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C.Cir.1976) (en banc) ("We must look at the decision not as the chemist, biologist or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality."); *see also State Farm*, 463 U.S. at 43, 103 S.Ct. 2856. For the reasons discussed in Part III.A-C above, we conclude that it was. *See Animal Legal Defense Fund, Inc. v. Glickman*, 204 F.3d 229, 234 (D.C.Cir.2000) (noting overlap between analysis under *Chevron* and *State Farm*). We agree with the agency that its general reliance on the mass of VOC emissions, coupled with the exemption for those VOCs known to be negligibly reactive and the upward adjustment for those known to be highly reactive, constitutes a reasonable approach given both "the uncertainties and inconsistencies of reactivity," REPORT at 2-10 (J.A. at 532), and "Congress's direction that the EPA complete the study within three years," Final Listing, 63 Fed.Reg. at 48,796. In reaching this conclusion, "[o]ur analysis is guided by the deference traditionally given to agency expertise, particularly when dealing with a statutory scheme as unwieldy and science-driven as the Clean Air Act." *Appalachian Power Co. v. EPA*, 135 F.3d 791, 801-02 (D.C.Cir.1998).

IV

In this Part, we consider a number of additional, miscellaneous charges leveled by petitioners against the architectural coatings rule. Some raise questions of statutory interpretation under the Clean Air Act, some charge EPA with arbitrary and capricious decisionmaking under that Act, and some involve a combination of the two.

A

Dunn-Edwards attacks the EPA study for "fail[ing] to address the beneficial environmental and health effects of the negative reactivity" of some VOCs. Dunn-Edwards Br. at 12. There is evidence, the company contends, showing that the emissions of certain types of VOCs actually reduce ozone levels. The agency's failure to consider the positive health effects of a restricted pollutant, Dunn-Edwards continues, constitutes both a violation of the Clean Air Act and unreasonable agency action. *See* Dunn-Edwards Br. at 13 (citing *American Trucking Ass'n v. U.S. E.P.A.*, 175 F.3d 1027, 1051 (D.C.Cir.1999), cert. granted,—U.S.—, 120 S.Ct. 2003, 146 L.Ed.2d 954 (2000)).

The answer to this challenge is that EPA did consider the possible effects of negative reactivity. *See* RESPONSE TO COMMENTS at 2-92 to 2-95 (J.A. at 757- 760). It concluded, however, that the phenomenon was too rare and unpredictable to warrant changes in the regulatory structure. *See id.* at 2-92 to 2-93 (J.A. at 757-58) (concluding that "reduction of ozone by VOC occurs in very limited circumstances"). Negative reactivity, the agency determined, occurs "only in very limited cases, with only a few species of VOC (not VOC species typically used in consumer and commercial products), and under specific meteorological conditions." *Id.* at 2-154 (J.A. at 802). Studies offered by petitioners were not to the contrary. *See, e.g.*, J.A. at 985-86 (study describing "slightly negative values" for two

compounds in one-hour test in Los Angeles, but noting that all compounds tested there showed positive values in eight-hour tests). Because EPA reasonably considered, and discounted, the phenomenon of negative reactivity, we reject this challenge.

B

In a related attack, Dunn-Edwards contends that EPA's rule may also be counterproductive because it "has the potential to increase ozone levels in two ways." Dunn-Edwards Br. at 21. First, because the rule imposes limits on the mass of VOCs in a product, rather than on the type (reactivity) of the VOCs, it "allows for the possibility" that producers of architectural coatings may substitute more reactive VOCs for less reactive ones. *Id.* Although the reformulated products would then emit a smaller quantity of VOCs as measured by mass, they would generate more ozone over all. Second, Dunn-Edwards warns, "if performance is compromised" by reducing the VOC content of architectural coatings, the overall volume of such products used to attain the same results will increase—in the form of more coats, more touch-ups, and more frequent recoating. *Id.*

As the quoted portions of petitioner's argument suggests, it is framed more as a series of theoretical possibilities than of fact-based predictions. Petitioners offer no evidence at all that the VOC substitution they fear will occur. EPA's own view is that even if such substitution did occur, the benefit from reducing the total mass of VOC emissions would outweigh any differences in relative reactivities of different compounds. *See* EPA, NATIONAL VOLATILE ORGANIC COMPOUND EMISSION STANDARDS FOR ARCHITECTURAL COATINGS, BACKGROUND FOR PROMULGATED STANDARDS 2-297 (1998) (J.A. at 437) [hereinafter BACKGROUND]. In the absence of contrary evidence, it is to the expert agency's prediction, rather than to the petitioner's, that we must defer. *See Her Majesty the*

Queen in Right of Ontario v. U.S. E.P.A., 912 F.2d 1525, 1534 (D.C.Cir.1990); *New York v. U.S. E.P.A.*, 852 F.2d 574, 580 (D.C.Cir.1988).

EPA also found "no evidence or documentation to support the[ ] claims [that] increased thinning, more priming, more topcoating, and more frequent painting" would result if the VOC content of architectural coatings were reduced. BACKGROUND at 2-293 (J.A. at 433). To the contrary, the agency cited evidence that low VOC content coatings perform well and do not require additional coats to achieve the same results as those with high VOC content. *See* BACKGROUND at 2-293 to 2-297 (J.A. at 433-37); Proposed Rule, 61 Fed.Reg. at 32,738; *see also* Final Rule, 63 Fed.Reg. at 48,869 (finding "no link between product quality and VOC content since quality, high-performing products are available in a wide range of VOC content levels in many product categories"). In reply, Dunn-Edwards cites a California survey indicating that between 1980 and 1990, total VOC emissions from architectural coatings increased by 16%, notwithstanding that the VOC content of such coatings decreased by 37% during the same period. *See* Dunn-Edwards Reply Br. at 10. Poorer performance by the reduced VOC paint "may be responsible," Dunn-Edwards asserts. *Id.* And it may be that Dunn-Edwards is right. But without evidence of cause-and-effect, we cannot know. Dunn-Edwards offers no evidence that the increase in VOC emissions during the 1980s was due to the poorer performance of the paints, rather than to the cause suggested by the EPA: an increase in the volume of paints used during that time, spurred by growth in the population, an improved economy, and an increase in construction.

C

The architectural coatings rule regulates the manufacture and sale of coating products nationwide. Allied contends that this exceeds EPA's authority, which it asserts is limited to

regulating manufacture and sale within "nonattainment" areas. A nonattainment area is one that either does not meet the national primary or secondary ambient air quality standard for ozone, or that contributes to ozone levels in a nearby area that does not meet the standard. *See* 42 U.S.C. § 7407(d). Allied's contention principally relies on two subsections of section 183(e). First, subsection (2)(A) requires EPA to study VOC emissions in order to determine their potential "to contribute to ozone levels which violate the national ambient air quality standard for ozone." *Id.* § 7511b(e)(2)(A)(i). Second, subsection (3)(A) requires the EPA to list, and then to regulate, those categories of products that "account for at least 80 percent of the VOC emissions . . . from consumer or commercial products in areas that violate the NAAQS for ozone." *Id.* § 7511b(e)(3)(A).

Neither of these provisions says anything about where the regulated product itself must be manufactured or sold, or about the geographic scope of EPA's regulatory authority. Rather, the first directs EPA to consider the potential of emissions to contribute to ozone levels that violate the NAAQS; the second instructs it to regulate categories of products that account for a specified percentage of emissions in nonattainment areas. As EPA concludes, this language permits the agency to regulate nationwide in order to accomplish emissions reduction in nonattainment areas.

EPA's reading is bolstered by consideration of other provisions in the same section. For example, subsection (3)(A) also states that "[i]n order to carry out this section, the Administrator may, by regulation, control or prohibit any activity, including the manufacture or introduction into commerce, offering for sale, or sale of any consumer or commercial product." *Id.* § 7511b(e)(3)(A) (emphasis added); *see also id.* § 7511b(e)(4) ("The regulations under this subsection may include any system or systems of regulation as the Administrator may deem appropriate.").

Similarly, subsection (1)(C) defines "regulated entities" as manufacturers and distributors of consumer or commercial products for sale in interstate commerce "in the United States," without geographic limitation. *Id.* § 7511b(e)(1)(C)(i). Thus, although Congress did direct EPA to regulate VOCs in order to improve conditions within nonattainment areas, nothing in the statute limits its ability to regulate the manufacture and sale of VOCs outside such areas if such regulation is reasonably related to that end.[7]

EPA readily persuades us that nationwide regulation is reasonably related to the statutory objective. First, architectural coating products are widely distributed and easily transportable across area boundaries. *See* Final Listing, 63 Fed.Reg. at 48,804. End-users (e.g., commercial painters) themselves may well utilize these products in different locations from day to day. *See id.*[8] Accordingly, as EPA reasoned, a national rule is necessary to "preempt opportunities for endusers to purchase such consumer and commercial products in attainment areas and then use them in

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[7] For that reason, section 183(e) is different from Clean Air Act section 165(a), which we considered in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C.Cir.1979). The latter section expressly limits EPA's permit authority to facilities "constructed in any area to which [Part C] applies," 42 U.S.C. § 7475(a) (emphasis added). *See* Alabama Power, 636 F.2d at 365. Section 183(e) does not contain an analogous limitation.

[8] As the National Paint & Coatings Association wrote in its intervening brief in support of the EPA:

> A manufacturer or disributor, whether big or small, that sells an architectural coatings product can never be sure where that product will end up being used. For example, a small manufacturer in Maryland who manufactures his paint solely in Maryland and sells his paint to contractors only in Maryland may have his paint used in Washington D.C. one day, Virginia the next day, West Virginia the next day, and finally used to paint a weekend beach house in Delaware the next day.

NPCA Br. at 24.

nonattainment areas, thereby circumventing the regulations and undermining the decrease in VOC emissions in nonattainment areas." Final Listing, 63 Fed.Reg. at 48,804.

A manufacturer or distributor, whether big or small, that sells an architectural coatings product can never be sure where that product will end up being used. For example, a small manufacturer in Maryland who manufacturers his paint solely in Maryland and sells his paint to contractors only in Maryland may have his paint used in Washington, D.C. one day, Virginia the next day, West Virginia the next day, and finally used to paint a weekend beach house in Delaware the next day. NPCA Br. at 24.

Second, just as coating products are easily transportable, so too are the VOCs they release and the ozone the VOCs create. Ambient VOCs and ozone do not obey geographic boundaries and can flow freely between attainment and nonattainment areas. *See* Final Listing, 63 Fed.Reg. at 48,804; *see also Virginia v. EPA*, 108 F.3d 1397, 1400 (D.C.Cir.1997). Thus, EPA reasonably concluded that "emissions in attainment areas can contribute to nonattainment in adjoining nonattainment areas," and that a nationwide rule is therefore consistent with its statutory mandate. Final Listing, 63 Fed.Reg. at 48,803.

D

Dunn-Edwards contends that because section 183(e) requires a study of "emissions of volatile organic compounds into the ambient air," 42 U.S.C. § 7511b(e)(2)(A), EPA violated its directive by focusing its study and rule on VOC content rather than emissions. That focus, petitioner suggests, assumes without foundation that all VOCs contained in a coating will be emitted into the ambient air. But EPA did not assume that all of a product's VOCs would be emitted. Rather, it employed a test to determine the mass of solvents

that would volatize, and limited its calculation of VOC content to the latter alone.[9]

Dunn-Edwards also contends that even when VOCs are emitted from a product, they may not become "available" in the atmosphere to form ozone—for example, because they may be emitted indoors rather than outside. EPA considered this assertion during the rulemaking, and responded by pointing to recent studies suggesting that "close to 100 percent of the VOC from paint is eventually emitted into the ambient air." RESPONSE TO COMMENTS at 2-64 (J.A. at 729). Because this conclusion is supported by substantial evidence, the agency's decision to control VOC emissions through the regulation of VOC content is reasonable.[10]

E

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[9] In EPA's test, the paint sample is weighed, heated, and reweighed. VOC content is calculated as the difference in the two weights, after also subtracting the weight of water and any exempt compounds. Hence, solvents that do not volatize under the test conditions are not measured as VOC. *See* RESPONSE TO COMMENTS at 2-56 (J.A. at 723). In a footnote, Dunn-Edwards contends that because paints are not heated when applied, this test "does not bear the necessary relationship to actual conditions in which coatings are used." Dunn-Edwards Br. at 16 n.16 (citing *Chemical Mfrs. Ass'n v. EPA*, 28 F.3d 1259, 1264 (D.C.Cir.1994)). EPA's rejoinder is that heating simply accelerates the emissions of VOC, but does not increase total emissions over time. In the absence of contrary evidence, we defer to the agency's expert opinion.

[10] Dunn-Edwards also contends that EPA was required to account for reactivity variation caused by differences in the makeup of the ambient air in different airsheds, noting that the agency conceded that "ideally" ozone control strategies should consider the conditions in specific airsheds. *See* Dunn-Edwards Br. at 17 n.17 (citing REPORT at 2-1 (J.A. at 523)). Nothing in the statutory language, however, requires airshed-by-airshed analysis. Nor does this court's authority extend to requiring EPA to utilize the "ideal" strategy, particularly not when the agency concludes that such a strategy is not practical in light of the limitations of the existing data. *See* REPORT at 2-1 (J.A. at 523).

Section 183(e) directs EPA to take into consideration five factors in establishing criteria for regulating consumer and commercial products, as well as in establishing regulatory priorities among those products. *See* 42 U.S.C. § 7511b(e)(2)(B), (e)(3)(A). Allied contends that EPA erred by failing to consider the last three factors listed in the statute:

> (iii) Those consumer and commercial products which emit highly reactive volatile organic compounds into the ambient air.
>
> (iv) Those consumer and commercial products which are subject to the most cost-effective controls.
>
> (v) The availability of alternatives (if any) to such consumer and commercial products which are of comparable costs, considering health, safety, and environmental impacts.

Id. § 7511b(e)(2)(B).[11] We reject this challenge.

First, EPA did consider the three listed factors. Each was expressly included among the regulatory criteria adopted by the agency, and was applied in establishing regulatory priorities. *See* REPORT at 4-6 (J.A. at 562) (factor iii); *id.* at 4-10 to 4-11 (J.A. at 566-67) (factor iv); *id.* at 4-8 to 4-9 (J.A. at 564-65) (factor v); *see also* Final Listing, 63 Fed.Reg. at 48,794 (listing criteria); Notice of Product Category List, 60 Fed.Reg. at 15,266 (same); REPORT at 4-12 to 4-13 (J.A. at 568-69) (describing application of the criteria); EPA, NATIONAL AIR POLLUTION CONTROL TECHNIQUES ADVISORY COMMITTEE MEETING ON CONSUMER AND COMMERCIAL PRODUCTS 53 (1995)

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[11] The first two factors listed in the statute are: "(i) The uses, benefits, and commercial demand of consumer and commercial products [; and] (ii) The health or safety functions (if any) served by such consumer and commercial products." 42 U.S.C. § 7511b(e)(2)(B).

(J.A. at 700) (describing EPA's scoring of product categories based on the criteria).

Second, EPA's consideration of these factors was adequate to constitute reasoned decisionmaking. As we have discussed above, EPA considered the third factor by assigning greater weight to those products that emit VOCs from one of the ten classes of VOCs that are highly reactive, an approach we regard as consistent with the statute and neither arbitrary nor capricious. *See supra* Part III. EPA reasonably considered the fourth factor by assigning a higher priority to categories of products that can reduce VOC emissions at lowest cost. *See* REPORT at 4-10 to 4-11 (J.A. at 566-67).[12] And EPA adequately considered the fifth factor, the availability of alternatives at comparable costs, by applying a criterion that evaluated the possibility of reformulation of the product and the availability of substitutes. *See* REPORT at 4-8 to 4-9 (J.A. at 564-65); *see also* RESPONSE TO COMMENTS at 2-27 (J.A. at 714).[13]

In addition to alleging that EPA failed to consider these three statutorily-enumerated factors, Allied contends that EPA impermissibly considered two further factors not listed in the statute: "magnitude of annual VOC emissions" and "regulatory efficiency and program considerations." Final Listing, 63 Fed.Reg. at 48,794; *see supra* note 3. Although it is true that "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider," *State Farm*, 463 U.S. at 43,

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[12] EPA used cost-effectiveness data where it was available, and where it was not, used a matrix that considered the availability of alternatives and the mass of emissions from the product. *See* REPORT at 4- 10 to 4-11 (J.A. at 566-67).

[13] EPA reasonably relied on consumer acceptance, as measured by market share data, as a surrogate for cost data which was of limited availability. *See* REPORT at 4-8 to 4-9 (J.A. at 564-65); *see also* RESPONSE TO COMMENTS at 2-27 (J.A. at 714).

103 S.Ct. 2856, that is not the case here. Nothing in section 183(e) suggests that Congress intended to limit EPA's consideration to the five factors specified in the statute. Indeed, the structure of the section suggests the contrary. Subsection (2)(A) first directs the agency to "establish criteria"; subsection (2)(B) then directs that "[i]n establishing the criteria," the agency "shall take into consideration" the five listed factors. The reasonable inference taken by EPA is that while it must consider the five listed factors, it is not barred from considering additional ones. *See George E. Warren Corp. v. U.S. E.P.A.*, 159 F.3d 616, 624 (D.C.Cir.1998) (noting this court's "usual reluctance to infer from congressional silence an intention to preclude the agency from considering factors other than those listed in a statute").

Moreover, the two additional criteria are reasonable in light of the use to which Congress wanted all of the criteria to be put: establishing regulatory priorities among the categories of consumer and commercial products. *See* 42 U.S.C. § 7511b(e)(3)(A). We have already considered, and judged permissible, EPA's accordance of greater regulatory priority to product categories that emit greater masses of VOCs—the first of the two additional criteria. *See supra* Part III. The agency's consideration of the second additional factor, denominated as "regulatory efficiency," seems nothing more than regulatory common sense: in determining priorities, EPA considered which categories it could regulate quickly because, for example, the agency had ongoing or recently completed rulemakings concerning them, or because they raised factual issues in common with other categories. *See* REPORT at 4-12 to 4-13 (J.A. at 568-69).

V

So far, we have considered challenges to the architectural coatings rule based on the Clean Air Act. In this part, we consider Allied's claims that the rule is contrary to the

Regulatory Flexibility Act (RFA)[14] as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[15] and to the Unfunded Mandates Reform Act (UMRA).[16]

A

Section 603(a) of the RFA requires that an agency, at the time of issuance of a notice of proposed rulemaking, publish an initial regulatory flexibility analysis which "shall describe the impact of the proposed rule on small entities." 5 U.S.C. § 603(a). Section 603(c) requires that such an initial analysis also describe "any significant alternatives to the proposed rule which accomplish the stated objectives" of the applicable statute while minimizing significant economic impact on small entities. *Id.* § 603(c). Allied contends that EPA failed to comply with section 603(a) by failing to discuss two such economic impacts: "stigmatic harm" allegedly arising from the agency's suggestion that it may impose more stringent VOC limits in future regulations;[17] and asset devaluation, in

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[14] 5 U.S.C. §§ 601 *et seq.*

[15] Pub.L. No. 104-121, §§ 241-42, 101 Stat. 857, 864-68 (1996).

[16] 2 U.S.C. §§ 1501 *et seq.*

[17] In announcing the architectural coatings rule, EPA stated that in the future "an additional study for this category may be warranted to determine the feasibility of additional reductions in VOC limits." Final Rule, 63 Fed.Reg. at 48,872. Allied contends not only that this announcement imposes a "stigma" on manufacturers, but that EPA would be without authority to issue such additional reductions. EPA replies, *inter alia*, that this claim is unripe: The agency has not yet decided whether it will issue any further regulations, and Allied has not established that it will suffer any harm in the interim. We agree. *See Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 471 (D.C.Cir.1998); *Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1419-21 (D.C.Cir.1998). Allied "will have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 734, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998).

that the coatings rule allegedly will render existing product formulas valueless. Allied also contends that EPA failed to comply with section 603(c) by failing to consider label directions as an alternative to VOC limits.

We are without jurisdiction to consider these challenges to EPA's compliance with the initial regulatory flexibility analysis requirements of section 603. Section 611(c) of the RFA states that "[c]ompliance or noncompliance by an agency with the provisions of this chapter shall be subject to judicial review only in accordance with this section." 5 U.S.C. § 611(c). Section 611(a) specifically lists the sections of the RFA subject to judicial review, and section 603 is not on the list.[18] *See id.* § 611(a)(1), (2).

That, however, is not the end of the story. As Allied points out, although we may not review EPA's handling of these issues in terms of the agency's compliance with the RFA, we may consider them in determining whether EPA complied with the overall requirement that an agency's decisionmaking be neither arbitrary nor capricious. *See* Clean Air Act, 42 U.S.C. § 7607(d)(9)(A); *see also* APA, 5 U.S.C. § 706(2)(A). That was the law prior to passage of SBREFA's amendments to the RFA, *see Thompson v. Clark*, 741 F.2d 401, 405

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[18] In its reply brief, Allied notes that unlike challenges to an agency's compliance with section 603 (concerning initial regulatory flexibility analyses), challenges to compliance with RFA section 604 (concerning final regulatory flexibility analyses) are included in the jurisdictional list of section 611. Allied suggests that the challenges noted in the above text can be reformulated as challenges to compliance with section 604. In relevant part, that section requires the agency to describe the steps it has taken "to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of ... why each of the other significant alternatives to the rule considered by the agency ... was rejected." 5 U.S.C. § 604(a)(5) (emphasis added). For the reasons noted in the text, Allied has not established that the economic impacts and regulatory alternative it contends EPA ignored can be classified as "significant."

(D.C.Cir.1984); *Small Refiner Lead Phase-Down Task Force v. U.S. E.P.A.*, 705 F.2d 506, 539 (D.C.Cir.1983), and it was not altered by those amendments.[19]

For an agency's decisionmaking to be rational, it must respond to significant points raised during the public comment period. *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C.Cir.1977). EPA did so here. The agency stated that it was not aware of any stigmatic harm of the kind urged by Allied, and reasonably concluded that the comments submitted on the subject had "not provided enough detail to allow the EPA to consider the issue further." BACKGROUND at 2-334 (J.A. at 474). Allied's unadorned allegation in its brief, that "[s]uch impacts are significant," Allied Br. at 23, adds no further detail and no reason to require further agency response. EPA also reasonably rejected the contention that it was ignoring the regulation's impact on the value of existing product formulas, noting that to the contrary it was directly considering that impact by analyzing the effect of the regulation on annual profits per product. *See* BACKGROUND at 2-334 (J.A. at 474).

To be regarded as rational, an agency must also consider significant alternatives to the course it ultimately chooses. *See State Farm*, 463 U.S. at 48-51, 103 S.Ct. 2856; *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 471

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[19] Prior to the amendments, section 611(b) stated: "When an action for judicial review of a rule is instituted, any regulatory flexibility analysis for such rule shall constitute part of the whole record of agency action in connection with the review." 5 U.S.C. § 611(b) (1994). In Thompson, 741 F.2d at 405, we held that those words "mean[ ] that the reviewing court will consider the contents of the preliminary or final regulatory flexibility analysis, along with the rest of the record, in assessing not the agency's compliance with the Regulatory Flexibility Act, but the validity of the rule under other provisions of law," particularly the APA. The current version of section 611(b) contains the same words, with minor stylistic alterations.

(D.C.Cir.1998); *Public Citizen v. Steed*, 733 F.2d 93, 99 (D.C.Cir.1984). Allied contends that the agency should have considered imposing a requirement that labels contain directions for responsible use of coating products, as an alternative to imposing VOC limits on such products.[20] But the agency did consider the possibility of imposing label directions as an addition to product reformulation, and even in that respect found "it would be impossible to predict the VOC reductions achieved by providing the consumer with directions for use." REPORT at 2-14 (J.A. at 536). Allied offers no response to this defect in the labeling alternative, and no reason to believe that such an approach would accomplish the objectives of the Clean Air Act. Accordingly, we reject Allied's challenges under the RFA.[21]

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[20] The Clean Air Act authorizes, but does not require, "directions for use" as one of numerous possible means of achieving emissions reduction. 42 U.S.C. § 7511b(e)(1)(A) (defining "best available controls" as the degree of emissions reduction achievable through application of "the most effective equipment, measures, processes, methods, systems or techniques, including chemical reformulation, product or feedstock substitution, repackaging, and directions for use, consumption, storage, or disposal").

[21] Allied briefly raises two further RFA claims. First, it charges that the agency failed to comply with the requirement of section 609(b) that it, inter alia, convene a review panel prior to issuing the initial regulatory flexibility analysis. This court, however, has no jurisdiction to review challenges to an agency's compliance with section 609(b). *See* 5 U.S.C. § 611(a)(1)-(2), (c). Second, Allied contends that EPA failed to comply with the requirement of section 601(3) that it provide an opportunity for public comment before adopting (as it did) a definition of the term "small business" different from that referenced in the statute. *See* 5 U.S.C. § 601(3); 15 U.S.C. § 632(a). Although we do have jurisdiction to review a section 601 challenge, *see* 5 U.S.C. § 611(a)(1)-(2), Allied's challenge fails on the merits because EPA did provide an opportunity for public comment on its proposed definition. *See* National Volatile Organic Compound Emission Standards for Architectural Coatings, Extension of Public Comment Period, 61 Fed.Reg. 46,410, 46,411 (1996);

B

Allied contends that EPA violated provisions of the Unfunded Mandates Reform Act that require preparation of a written cost-benefit analysis, *see* 2 U.S.C. § 1532(a)(2), and selection of the "least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule," *id.* § 1535(a). UMRA itself expressly denies courts jurisdiction to review compliance with the latter provision. *See id.* § 1571(b)(1); *see also id.* § 1571(a). And while the Act permits limited judicial review of compliance with the requirement to prepare a written cost-benefit analysis,[22] that requirement is not triggered unless the rule in question may result in expenditures of $100 million or more in any one year, *see id.* § 1532(a). Because EPA estimated the total cost associated with the architectural coatings rule to be only $32 million per year, *see* Final Rule, 63 Fed.Reg. at 48,855, it concluded that UMRA was inapplicable. *See id.* at 48,875-76.

Allied challenges EPA's cost estimate, but advances little basis for such a challenge beyond the complaints we considered above in the context of Allied's RFA claim: Petitioner contends that EPA ignored the "stigmatic" costs it imposed through its suggestion that more stringent VOC limits might be promulgated in the future, as well as the impact of the coatings rule on the market value of existing

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BACKGROUND at 2-373 to 2-375, 2-424 to 2-426 (J.A. at 480- 82, 490-92).

[22] UMRA, 2 U.S.C. § 1571(a)(2)(A), states that agency compliance with section 1532 is subject to judicial review only under 5 U.S.C. § 706(1) (court may compel agency action unlawfully withheld). If an agency fails to prepare the written statement required by section 1532, "a court may compel the agency to prepare such written statement," 2 U.S.C. § 1571(a)(2)(B), but the failure may "not be used as a basis for . . . invalidating or otherwise affecting [the] rule," *id.* § 1571(a)(3).

product formulas.[23] We concluded above that EPA dealt with these issues in a reasonable manner and, given the limited judicial review applicable to compliance with section 1532(a), *see supra* note 22, we have no warrant for inquiring further under UMRA.[24]

VI

Finally, we consider Allied's argument that in regulating architectural coatings, Congress exceeded its constitutional authority "[t]o regulate Commerce . . . among the several States." U.S. Const., art. I, § 8, cl. 3. Dunn-Edwards does not join in this attack, and the intervenor National Paint & Coatings Association actively opposes it, preferring uniform national regulation to the "multiple, divergent state rules" that would otherwise hold sway. NPCA Br. at 3. The crux of Allied's argument is that EPA's regulation exceeds Congress'

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[23] Allied's brief also asserts, without elaboration, that EPA "excluded from its calculus losses to (1) retailers, (2) contractors, (3) workers, and (4) consumers," and that each of these categories "may alone reach $100,000,000 in any year." Allied Br. at 25. But EPA did consider the effect of the rule on many of these groups, *see* EPA, DRAFT ECONOMIC IMPACT ANALYSIS AND REGULATORY FLEXIBILITY ANALYSIS OF AIR POLLUTION REGULATIONS: ARCHITECTURAL AND INDUSTRIAL MAINTENANCE COATINGS 2-32 to 2- 40, 2-44 to 2-45 (J.A. at 33-41, 45-46); BACKGROUND at 2-364 to 2-366 (J.A. at 1017-19), and Allied offers neither support for nor explanation of the loss calculation it asserts.

[24] In a related argument, Dunn-Edwards contends that EPA must consider costs in the course of examining "economic feasibility," a factor in the evaluation of "best available controls" under the statute, 42 U.S.C. § 7511b(e)(1)(A). Dunn-Edwards argues that EPA's cost estimate was arbitrary and capricious, largely because the agency reduced its initial estimate after receiving cost estimates submitted by commenters without determining the reliability of those estimates. In fact, EPA did evaluate the reasonableness of the comments, utilizing data from only 11 out of 27 because the others suffered from incompleteness or lack of clarity, or from a failure to provide cost information on a per product basis. *See* BACKGROUND at 2-304 to 2-305 (J.A. at 444-45).

authority under the Commerce Clause because there is an insufficient nexus between coatings manufacture, which it describes as an intrastate event, and the interstate phenomenon of ozone formation.

Allied attempts to rely on the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), striking down the Gun-Free School Zones Act [25] which made it a federal crime knowingly to possess a firearm in a school zone. In *United States v. Morrison*,—U.S.—, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), handed down last month, the Court relied on *Lopez* in holding that Congress also lacked authority under the Commerce Clause to provide a federal civil remedy for the victims of gender-motivated violence. In both cases, the Court agreed that " 'Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce.' " *Id.* at 1749 (quoting *Lopez*, 514 U.S. at 558-59, 115 S.Ct. 1624). As *Morrison* explained, however, four considerations contributed to *Lopez's* conclusion that the Gun-Free School Zones Act did not fall within that category of regulatable activity. Not one of those considerations applies to section 183(e) of the Clean Air Act.

The Court held, first, that "in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." *Id.* at 1750 (citing *Lopez*, 514 U.S. at 559-60, 115 S.Ct. 1624). *Morrison* noted that the criminal statute at issue in *Lopez* " 'had nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms.' " *Id.* at 1749 (quoting *Lopez*, 514 U.S. at 561, 115 S.Ct. 1624). It said that the same was true of the federal civil

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[25] 18 U.S.C. § 922(q)(1)(A).

remedy provision of the Violence Against Women Act (VAWA).[26] *See id.* at 1747. But the same cannot be said of the Clean Air Act provisions concerning VOC emissions, which permit regulation only of:

> (i) manufacturers, processors, wholesale distributors, or importers of consumer or commercial products for sale or distribution in interstate commerce in the United States; or
>
> (ii) manufacturers, processors, wholesale distributors, or importers that supply the entities listed under clause (i) with such products for sale or distribution in interstate commerce in the United States.

42 U.S.C. § 7511b(e)(1)(C).

Second, *Morrison* noted that in *Lopez*, the Gun-Free School Zones Act, like VAWA, "contained 'no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.' " *Morrison*, 120 S.Ct. at 1751 (quoting *Lopez*, 514 U.S. at 562, 115 S.Ct. 1624). As quoted above, however, EPA's regulation of VOCs is expressly limited to entities that act "in interstate commerce." 42 U.S.C. § 7511b(e)(1)(C).

Third, *Morrison* pointed out that neither the Gun-Free School Zones Act, " 'nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.' " *Id.* (quoting *Lopez*, 514 U.S. at 562, 115 S.Ct. 1624). The legislative history of the Clean Air Act Amendments, by contrast, expressly describes the problem of interstate transport of ozone, *see, e.g.*, S.REP. NO. 101-228, at 3, 13, 49 (1989), U.S. Code Cong. & Admin. News at 3385, 3388,

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[26] 42 U.S.C. § 13981.

3399, 3435, as well as its effects on the national economy, *see, e.g., id.* at 8-9.

Finally, according to *Morrison*, the "decision in *Lopez* rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated," *Morrison*, 120 S.Ct. at 1751, which the Court said was true of gender-motivated violence as well, *see id.* at 1752. But, there is nothing attenuated about the interstate effects of the activity regulated here. We ourselves have noted the interstate nature of the "ozone transport phenomenon," and the way in which it may render any given state unable to achieve attainment because of ozone created hundreds of miles away. *See Virginia v. EPA*, 108 F.3d 1397, 1400 (D.C.Cir. 1997). The legislative history and EPA's report to Congress substantiate the heavy impact ozone pollution has on national health care costs and national agricultural production. *See* S.REP. NO. 101-228, at 8-9 (1989); REPORT at 1-1 (J.A. at 518). And the rulemaking record sustains the proposition that the large majority of the products regulated by the rule are distributed nationally, and then applied by end-users in multiple locations, *see* 63 Fed.Reg. 48,792, 48,804—facts that are confirmed, and stressed, by the National Paint & Coatings Association, *see* NPCA Br. at 24.

In short, none of the considerations that led the Court to find Congress' authority wanting in *Lopez* and *Morrison* has any application to section 183(e) of the Clean Air Act. In *Hodel v. Virginia Surface Mining and Reclamation Ass'n*—a case cited with approval by the Supreme Court in both *Lopez* and *Morrison*, *see Lopez*, 514 U.S. at 557, 115 S.Ct. 1624; *Morrison*, 120 S.Ct. at 1748-50—the Court declared that it "agree[d] with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards

that may have effects in more than one State." 452 U.S. 264, 282, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981). Contrary to Allied's assertion, nothing contained in the Court's recent Commerce Clause jurisprudence casts doubt on the validity of that declaration here.

VII

For the foregoing reasons, we reject petitioners' challenges to the architectural coatings rule and deny the petitions for review.

APPENDIX B

[Filed August 10, 2000]

UNITED STATES COURT OF APPEALS,
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 98-1526

ALLIED LOCAL AND REGIONAL MANUFACTURERS CAUCUS, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

NATIONAL PAINT & COATINGS ASSOCIATION, *et al.*,
Intervenors.

Consolidated with No. 98-1527

ORDER

Upon consideration of petitioners' petition for rehearing and petition for rehearing *en banc* filed on July 31, 2000, it is

ORDERED that respondent respond thereto and do so on or before August 25, 2000.

A reply to the response will not be accepted by the court.

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX C

[Filed October 13, 2000]

UNITED STATES COURT OF APPEALS,
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 98-1526

ALLIED LOCAL AND REGIONAL MANUFACTURERS CAUCUS, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

NATIONAL PAINT & COATINGS ASSOCIATION, *et al.*,
Intervenors.

Consolidated with No. 98-1527

Before: GINSBURG, TATEL, and GARLAND, Circuit Judges.

ORDER

Upon consideration of petitioners' petition for rehearing filed July 31, 2000, and of the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX D

STATUTES

42 U.S.C.A. § 7511b

§ 7511b. Federal ozone measures

(e) Control of emissions from certain sources

(1) Definitions

For purposes of this subsection—

(A) Best available controls

The term "best available controls" means the degree of emissions reduction that the Administrator determines, on the basis of technological and economic feasibility, health, environmental, and energy impacts, is achievable through the application of the most effective equipment, measures, processes, methods, systems or techniques, including chemical reformulation, product or feedstock substitution, repackaging, and directions for use, consumption, storage, or disposal.

(B) Consumer or commercial product

The term "consumer or commercial product" means any substance, product (including paints, coatings, and solvents), or article (including any container or packaging) held by any person, the use, consumption, storage, disposal, destruction, or decomposition of which may result in the release of volatile organic compounds. The term does not include fuels or fuel additives regulated under section 7545 of this title, or motor vehicles, non-road vehicles, and non-road engines as defined under section 7550 of this title.

(C) Regulated entities

The term "regulated entities" means—

(i) manufacturers, processors, wholesale distributors, or importers of consumer or commercial products for sale or distribution in interstate commerce in the United States; or

(ii) manufacturers, processors, wholesale distributors, or importers that supply the entities listed under clause (i) with such products for sale or distribution in interstate commerce in the United States.

(2) Study and report

(A) Study

The Administrator shall conduct a study of the emissions of volatile organic compounds into the ambient air from consumer and commercial products (or any combination thereof) in order to—

(i) determine their potential to contribute to ozone levels which violate the national ambient air quality standard for ozone; and

(ii) establish criteria for regulating consumer and commercial products or classes or categories thereof which shall be subject to control under this subsection.

The study shall be completed and a report submitted to Congress not later than 3 years after November 15, 1990.

(B) Consideration of certain factors

In establishing the criteria under subparagraph (A)(ii), the Administrator shall take into consideration each of the following:

(i) The uses, benefits, and commercial demand of consumer and commercial products.

(ii) The health or safety functions (if any) served by such consumer and commercial products.

(iii) Those consumer and commercial products which emit highly reactive volatile organic compounds into the ambient air.

(iv) Those consumer and commercial products which are subject to the most cost-effective controls.

(v) The availability of alternatives (if any) to such consumer and commercial products which are of comparable costs, considering health, safety, and environmental impacts.

(3) Regulations to require emission reductions

(A) In general

Upon submission of the final report under paragraph (2), the Administrator shall list those categories of consumer or commercial products that the Administrator determines, based on the study, account for at least 80 percent of the VOC emissions, on a reactivity-adjusted basis, from consumer or commercial products in areas that violate the NAAQS for ozone. Credit toward the 80 percent emissions calculation shall be given for emission reductions from consumer or commercial products made after November 15, 1990. At such time, the Administrator shall divide the list into 4 groups establishing priorities for regulation based on the criteria established in paragraph (2). Every 2 years after promulgating such list, the Administrator shall regulate one group of categories until all 4 groups are regulated. The regulations shall require best available controls as defined in this section. Such regulations may exempt health use products for which the Administrator determines there is no suitable substitute. In order to carry out this section, the Administrator may, by regulation, control or prohibit any activity, including the manufacture or introduction into commerce, offering for sale, or sale of any consumer or commercial product which results in emission of volatile organic compounds into the ambient air.

(B) Regulated entities

Regulations under this subsection may be imposed only with respect to regulated entities.

(C) Use of CTGS

For any consumer or commercial product the Administrator may issue control techniques guidelines under this chapter in

lieu of regulations required under subparagraph (A) if the Administrator determines that such guidance will be substantially as effective as regulations in reducing emissions of volatile organic compounds which contribute to ozone levels in areas which violate the national ambient air quality standard for ozone.

(4) Systems of regulation

The regulations under this subsection may include any system or systems of regulation as the Administrator may deem appropriate, including requirements for registration and labeling, self-monitoring and reporting, prohibitions, limitations, or economic incentives (including marketable permits and auctions of emissions rights) concerning the manufacture, processing, distribution, use, consumption, or disposal of the product.

(5) Special fund

Any amounts collected by the Administrator under such regulations shall be deposited in a special fund in the United States Treasury for licensing and other services, which thereafter shall be available until expended, subject to annual appropriation Acts, solely to carry out the activities of the Administrator for which such fees, charges, or collections are established or made.

(6) Enforcement

Any regulation established under this subsection shall be treated, for purposes of enforcement of this chapter, as a standard under section 7411 of this title and any violation of such regulation shall be treated as a violation of a requirement of section 7411(e) of this title.

(7) State administration

Each State may develop and submit to the Administrator a procedure under State law for implementing and enforcing regulations promulgated under this subsection. If the Administrator finds the State procedure is adequate, the

Administrator shall approve such procedure. Nothing in this paragraph shall prohibit the Administrator from enforcing any applicable regulations under this subsection.

(8) Size, etc.

No regulations regarding the size, shape, or labeling of a product may be promulgated, unless the Administrator determines such regulations to be useful in meeting any national ambient air quality standard.

(9) State consultation

Any State which proposes regulations other than those adopted under this subsection shall consult with the Administrator regarding whether any other State or local subdivision has promulgated or is promulgating regulations on any products covered under this part. The Administrator shall establish a clearinghouse of information, studies, and regulations proposed and promulgated regarding products covered under this subsection and disseminate such information collected as requested by State or local subdivisions.

Supreme Court, U.S.
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No. 00-1125

In the Supreme Court of the United States

ALLIED LOCAL AND REGIONAL MANUFACTURERS CAUCUS, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly reviewed Environmental Protection Agency's interpretation of Section 183(e) of the Clean Air Act, 42 U.S.C. 7511b(e), under the principles of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

2. Whether the court of appeals properly found the regulation of the manufacture and sale of paint and other architectural coatings under Section 183(e) of the Clean Air Act to be within Congress's power under the Commerce Clause.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 215 F.3d 61.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 2000. A petition for rehearing was denied on October 13, 2000 (Pet. App. 39a). The petition for a writ of certiorari was filed on January 11, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek review of a decision of the court of appeals arising from an Environmental Protection Agency (EPA) rulemaking under the Clean Air Act, 42 U.S.C. 7401 *et seq.*

1. The Clean Air Act establishes a comprehensive federal program to protect and enhance the quality of the nation's air resources through, among other things, the establishment of National Ambient Air Quality Standards for harmful air pollutants. 42 U.S.C. 7408. Ground-level ozone, which causes a variety of detrimental effects on humans and the environment, including adverse health effects (such as labored breathing and pulmonary inflamation), agricultural crop losses, and damage to forests and ecosystems, is such a pollutant.

When Congress amended the Clean Air Act in 1990, it added various provisions aimed at mitigating the problem of ground-level ozone. In particular, Section 183(e) of the Act, 42 U.S.C. 7511b(e), directed EPA to regulate emissions of Volatile Organic Compounds (VOCs) from consumer and commercial products in order to help States achieve the National Ambient Air Quality Standard for ozone. VOCs are a key constituent in the formation of ground-level ozone. Section 183(e) directed EPA: (1) to conduct a study of VOC emissions from consumer and commercial products to determine their potential to contribute to nonattainment of the ozone standard, and to submit that information in a report to Congress, 42 U.S.C. 7511b(e)(2)(A); (2) to develop criteria for regulation of such products, 42 U.S.C. 7511b(e)(2)(A)(ii) and (B); (3) to use the criteria to list and prioritize categories of products for regulation, 42 U.S.C. 7511b(e)(3)(A); and (4) to promul-

gate a series of regulations, each focusing on reducing VOC emissions from a particular product category, 42 U.S.C. 7511b(e)(3)(A).[1]

EPA submitted the statutorily required study to Congress and published a preliminary list of product categories in March of 1995. Following a notice-and-comment rulemaking, EPA published its final listing determination and regulations under Section 183(e) for three product categories on September 11, 1998. In its final determination, EPA identified and confirmed the first three product categories, and explained the process and bases for its decision to regulate those categories. 63 Fed. Reg. 48,792 (1998). On that same date, EPA published final regulations specifying limits on the permissible VOC content for the first three product categories: automobile refinish coatings, 63 Fed. Reg. at 48,806; certain household consumer products, 63 Fed. Reg. at 48,819; and architectural coatings, 63 Fed. Reg. at 48,848.

2. Petitioners, a trade association and several individual manufacturers of paint, filed petitions for review of EPA's regulations in the Court of Appeals for the District of Columbia Circuit. Petitioners did not directly challenge the VOC limits set in the rules for the relevant product categories. Instead, they challenged the process by which EPA selected the three categories for the first round of regulation. The court of appeals denied the petitions. Pet. App. 1a-37a.

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[1] Under Section 183(e), EPA can also issue—instead of or along with regulations—Control Guidelines Techniques (CGTs) to guide States in regulating the use of specified products to reduce VOC emissions in non-attainment areas. 42 U.S.C. 7511b(e)(3)(C). This case does not involve the promulgation of CGTs.

Petitioners' challenge, the court of appeals explained, must be analyzed under the now-familiar two-step process of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 7a. Under the first step, the court asks "whether Congress 'has directly spoken to the precise question at issue,' in which case" the court "'must give effect to the unambiguously expressed intent of Congress.'" *Ibid.* (quoting *Chevron*, 467 U.S. at 842-843). "If 'the statute is silent or ambiguous with respect to the specific issue,'" the court explained, the court moves to *Chevron*'s second step, under which the court "must defer to the agency's interpretation so long as it is 'based on a permissible construction of the statute' * * * and is 'reasonable in light of the Act's text, legislative history, and purpose.'" *Ibid.* (quoting *Chevron*, 467 U.S. at 843, and *Southern Cal. Edison Co.* v. *FERC*, 116 F.3d 507, 511 (D.C. Cir. 1997)). The court also noted that it has the power to set aside a final rule if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Ibid.*

Applying those standards, the court of appeals rejected petitioners' claim that EPA had failed to consider the extent to which various VOCs are "reactive," *i.e.*, the relative degree to which VOCs contribute to the formation of ground-level ozone. EPA, the court explained, not only had considered reactivity but in fact had established three categories of reactivity—negligibly reactive, reactive, and highly reactive. Pet. App. 8a. The court also rejected the claim that the statute requires EPA to determine the reactivity of each volatile compound individually, rather than by using broad categories. The statute, the court pointed out, merely directs EPA to study emissions of VOCs "from consumer and commercial products (or any com-

bination thereof) in order to . . . determine their potential to contribute to ozone levels." *Id.* at 10a (quoting 42 U.S.C. 7511b(e)(2)(A)). Congress's express reference to "any combination" of consumer and commercial products, and its direction that EPA determine "their" capacity (rather than "each's" capacity) to contribute to ozone, simply makes it "impossible to regard the statute as unambiguously expressing an intent that each VOC be analyzed individually." *Ibid.*

The court of appeals also rejected petitioners' claim that, under EPA's methodology, some compounds that should not be regulated might be regulated nonetheless. Pet. App. 14a-15a. That result, the court stated, is not likely given that EPA has expressly exempted from regulation those compounds determined to have negligible reactivity, and is especially unlikely given that pre-existing EPA regulations allow companies to apply to have compounds excluded from the definition of VOC. *Ibid.* The court also was not persuaded by the argument that, in a perfect regulatory-scheme, architectural coatings would not have been among the first products regulated. "There is no serious argument that architectural coatings would not appear somewhere on even a perfect regulatory list, given their status as one of the largest sources of VOC emissions among consumer and commercial products." *Id.* at 15a. As to the precise ranking of architectural coatings as a priority, the court explained, deference to EPA's reasonable methodology is particularly appropriate. *Ibid.*

The court of appeals also rejected petitioners' claim that, under *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), Congress lacks Commerce Clause authority to regulate in this area. Pet. App. 33a-37a. The court of appeals observed that, in *Morrison*, this Court identified four

considerations that had led to the invalidation of the statute at issue in *Lopez*: that the statute had nothing to do with commerce or commercial activities; that the statute contained no express jurisdictional element requiring a nexus to interstate commerce; that Congress had made no findings about interstate effects; and the great degree of attenuation between the regulated activity and the effect on interstate commerce. *Id.* at 34a-37a.

Here, the court of appeals explained, each of those factors supports Congress's power to regulate. Unlike the statute at issue in *Lopez* (which prohibited possession of a gun near schools), and the statute in *Morrison* (which dealt with gender-motivated violence), Section 183(e) is directed at *commercial* activity, namely the manufacture, sale, processing, and distribution of "consumer or commercial products for sale or distribution in interstate commerce." Pet. App. 35a (quoting 42 U.S.C. 7511b(e)(1)(C)(i)). Second, Section 183(e) does require an interstate nexus; for national regulations like those at issue here, the statute limits EPA's authority to regulating manufacturers, processors, wholesale distributors and importers of products for sale or distribution "in interstate commerce." *Ibid.* Third, there are express findings—by Congress, by EPA, and by the courts—regarding the interstate impact of the regulated activity. *Ibid.*

Fourth, here there could be no claim that the relationship between the regulated activity and interstate commerce is "attenuated." Pet. App. 36a. "We ourselves," the court explained, "have noted the interstate nature of the 'ozone transport phenomenon,' and the way in which it may render any given state unable to achieve attainment because of ozone created hundreds of miles away." *Ibid.* "And the rulemaking record

sustains the proposition that the large majority of the products regulated by the rule are distributed nationally." *Ibid.* Finally, the court of appeals noted, this Court had "agree[d] with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Id.* at 36a-37a (quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981)).

ARGUMENT

The decision of the court of appeals is correct, and does not conflict with any decision of this Court or any court of appeals. Accordingly, further review is not warranted.

1. Petitioners' first claim is that the court of appeals should not have reviewed EPA's rulemaking under the well-settled principles of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Instead, petitioners argue, the court of appeals should have applied this Court's decisions in *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), and *Christensen* v. *Harris County*, 529 U.S. 576 (2000). Pet. 5-19. That contention is without merit.

a. In *Brown & Williamson*, this Court itself applied the traditional two-step approach under *Chevron* to determine the validity of the FDA's tobacco regulations. "Because this case involves an administrative agency's construction of a statute that it administers," the Court explained, "our analysis is governed by *Chevron*." 529 U.S. at 132. Applying the first step of *Chevron*, the Court determined that Congress had spoken to whether the FDA had authority regulate

tobacco. Carefully canvassing the political history of tobacco, the Court concluded that Congress's actions over the previous 35 years "preclude an interpretation of the" Food, Drug, and Cosmetic Act "that grants the FDA jurisdiction to regulate tobacco products." *Id.* at 155. The Court took careful note that, throughout most of its history, the FDA had disavowed any authority to regulate tobacco. The Court concluded that Congress, by passing a host of tobacco-specific laws following the FDA's disavowal, and by acting to preclude any agency from exercising regulatory control over tobacco, had "effectively ratified the FDA's previous position that it lacks jurisdiction to regulate tobacco." *Id.* at 156.

The Court in *Brown & Williamson* also observed that its inquiry into whether Congress had spoken directly to the issue was "shaped, at least in some measure, by the nature of the question presented." 529 U.S. at 159. In "extraordinary cases," the Court explained, "there may be reason to hesitate before concluding that Congress has intended" an "implicit delegation" of power to regulate a certain segment of the economy. *Ibid.* In the context of tobacco, the Court explained, the unique political history of the product, the distinct regulatory scheme governing it, Congress's repeated rejections of proposals to allow the FDA to regulate tobacco, and Congress's repeated actions to preclude regulation of tobacco, all provided reason to hesitate:

> Owing to its unique place in American history and society, tobacco has its own unique political history. Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products, squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to

> preclude any agency from exercising significant policymaking authority in the area. Given this history and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the [FDA's] expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power.

Id. at 159-160.

Brown & Williamson is inapposite, as the foregoing description attests. Here, there are no "extraordinary" circumstances casting doubt on the agency's authority to regulate. This is not a case in which the agency, for the previous 35 years, disavowed power to regulate a particular product. It is not a case in which Congress effectively ratified the agency's disavowal; in which Congress repeatedly rejected proposals that would have empowered the agency to regulate; or in which Congress adopted proposals that created a distinct regulatory regime for the product at issue, only to have the agency later change its view. Instead, this is a case in which Congress clearly and unequivocally delegated to EPA the power to study and then regulate consumer and commercial products—such as architectural coatings—that release VOCs. 42 U.S.C. 7511b(e)(3)(A). Whatever *Brown & Williamson* adds to the analysis to be performed under *Chevron* step one in "extraordinary cases" like *Brown & Williamson*, 529 U.S. at 159, it has no application here.

Consequently, petitioners' repeated claim that Congress "did not explicitly empower EPA to" use three reactivity categories, Pet. 15-16, or that there can be no "implicit delegation of power" to adopt the regulations at issue here, Pet. 17, are without merit. *Brown & Williamson* does not replace traditional *Chevron* defer-

ence with a plain-statement test or with a requirement that all regulatory decisions be the product of unambiguous statutory command.[2] To the contrary, *Brown & Williamson* preserved the rule that, "if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible." 529 U.S. at 132. The court of appeals properly applied that approach when examining the validity of EPA's architectural coatings regulations, and nothing in *Brown & Williamson* undermines its judgment.

b. Petitioners' reliance on *Christensen* is likewise misplaced. In that case, this Court concluded that *Chevron* deference does not apply to agency statutory interpretations in opinion letters, policy statements, manuals, and enforcement guidelines that are not "arrived at after, for example, a formal adjudication or notice-and-comment rulemaking." 529 U.S. at 587. The Court expressly stated, however, that "the framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation." *Ibid.* In the present case, petitioners are challenging regulations promulgated through notice-and-comment rulemaking. As a result, under *Christensen*, traditional *Chevron* deference is appropriate.

Seeking to avoid that result, petitioners argue that they, in effect, are challenging EPA's 1995 report to Congress. Although that report was required by statute, it was not, they argue, an agency rule or decision. Pet. 11. But the 1995 report to Congress, which did not create binding rules governing peti-

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[2] Cf. *Whitman* v. *American Trucking Ass'ns*, 121 S. Ct. 903 (2001) (rejecting similar contentions under the non-delegation doctrine).

tioners' conduct, was not itself reviewable final agency action; and petitioners, in any event, sought to invalidate EPA's 1998 determination and the resulting regulations. Because the 1998 agency actions that petitioners sought to invalidate were "arrived at after * * * notice-and-comment rulemaking"—and represent the agency's "interpretation contained in a regulation"—*Chevron* deference was appropriate under *Christensen*, 529 U.S. at 587.[3]

2. Petitioners also assert that EPA's regulation of the manufacture and sale of paint and other consumer and commercial products to reduce VOC emissions falls outside Congress's constitutional authority to regulate under the Commerce Clause. Petitioners do not dispute that, in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981), this Court stated that "the power conferred by the Commerce Clause" is "broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." Nonetheless, petitioners ask this Court to revisit that principle. In addition, petitioners contend that *Hodel* cannot justify regulation of the *manufacture* and *sale* of paints because the manufacture and sale do not themselves create pollution; only the *use* of paint, they argue, creates air pollution. Pet. 21.

Those arguments are without merit. Contrary to petitioners' claims (Pet. 21), this Court's recent Commerce Clause decisions cast no doubt on Congress's power to legislate in this area. Petitioner relies largely

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[3] The remainder of petitioners' *Brown & Williamson*- and *Christensen*-based arguments (Pet. 8-19) are wholly factbound, and we rely on the decision of the court of appeals rejecting them.

on *Jones* v. *United States*, 529 U.S. 848 (2000), *United States* v. *Morrison*, 529 U.S. 598 (2000), and *United States* v. *Lopez*, 514 U.S. 549 (1995). Not one of those cases, however, involved the direct regulation of *commercial* activity. In *Morrison*, the activity at issue was gender-based violence, which Congress sought to regulate by providing a federal civil remedy for victims. In *Lopez*, the regulated activity was gun possession near schools; the statute made no effort to regulate the manufacture or sale of guns. And in *Jones*, the court held that arson of a home used as a private residence was not covered by a statute that prohibited arson of property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," 529 U.S. at 853, 859 (quoting 18 U.S.C. 844(i) (1994 & Supp. IV 1998)); such arson, the Court reasoned, had "merely a passive, passing, or past connection to commerce." *Id.* at 855. Here, by contrast the regulated activity—the manufacture or importation of paint for sale or distribution by entities engaged in interstate commerce—is undeniably commercial in nature. That the regulated activity is itself commercial (*i.e.*, it is economic activity) is, of course, a critical factor when evaluating Congress's power under the *Commerce* Clause. See *Morrison*, 529 U.S. at 610-612; *Lopez*, 514 U.S. at 561.

Moreover, as the court of appeals pointed out (and petitioners do not dispute), ground-level ozone is a problem of interstate dimension, Pet. App. 36a, and the statute specifically requires a proper nexus to interstate commerce in any event. Section 7511b(e)(1)(C) permits regulation of those entities that are manufacturers, processors, importers or wholesale distributors of architectural coatings "for sale or distribution in interstate commerce," as well as those that supply such

entities with such products. 42 U.S.C. 7511b(e)(1)(C). Those entities that do not make, process, import or distribute the products for interstate sale or distribution (or supply the entities that do) are not covered. Pet. App. 35a.[4]

Petitioners also assert that EPA should not be permitted to regulate the *manufacture* and *sale* of paints because manufacture and sale do not create interstate pollution; only *using* paint, petitioners declare, has that effect. Pet. 21. It is hard to see how that has any bearing on the Commerce Clause issue. The manufacture and sale of the paints constitute commercial activity with a sufficient nexus to interstate commerce to permit federal regulation, whether or not the activity itself produces pollution. That is particularly true given that, as the court of appeals noted, most paints are manufactured and distributed nationwide. Pet. App. 36a. See *Lopez*, 514 U.S. at 558-559 ("Congress' com-

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[4] Petitioners' contention that EPA's regulations are broader than the statute (Pet. 24-25) is not properly presented. The court of appeals read EPA's regulations as consistent with the statute, and we see no reason to read them otherwise. In any event, because the manufacture, processing, and sale of paint is commercial activity, Congress may regulate that activity so long as it has the requisite effect on interstate commerce, *even if* the individual product at issue does not cross state lines. *Lopez*, 514 U.S. at 559 ("[W]e have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce," including "intrastate coal mining" and "restaurants utilizing substantial interstate supplies."); *Wickard* v. *Filburn*, 317 U.S. 111 (1942). Here, EPA reasonably concluded that nationwide regulations are necessary to prevent the use of products from attainment areas in non-attainment areas, undermining the efforts to reduce VOC emissions in non-attainment areas. Pet. App. 22a-23a.

merce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce") (citation omitted); cf. *Wickard* v. *Filburn*, 317 U.S. 111 (1942) (regulation of wheat grown for consumption at home permissible because of effect on interstate commerce in the aggregate). Besides, petitioners' attempt to disassociate the manufacture and sale of the paint from its ozone-producing use is unpersuasive. The use of petitioners' products is an inevitable and intended consequence of their manufacture and sale. Nothing in the Constitution prohibits Congress from addressing the problem of ozone production by regulating the manufacture and trafficking in products that, when used as intended, generate that pollutant.

Alternatively, petitioners appear to argue that the Commerce Clause would not permit Congress to regulate the *use* of paint by individuals. That claim is not presented by this case. EPA's national architectural coatings regulations govern manufacturers, wholesale distributors, and importers of paint, not paint users. Pet. 21 ("The 'activities' regulated by EPA were those of manufacturing all paints for sale in the nation."). For the same reasons, there is no reason in this case to address petitioners' claim that Congress and EPA did not make sufficient findings to justify the regulation of paint usage, Pet. 21-22; that house painting is not a commercial activity, Pet. 27-28; or that house painting does not have a sufficient impact on interstate commerce.[5] Here, Congress authorized EPA to regulate

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[5] To a large degree, petitioners' challenge is not really aimed at the question of interstate commerce, but at the degree to which particular compounds (glycols) contribute to ozone formation. See

the manufacture of particular consumer and commercial products for sale and distribution—activities that are undeniably commercial and that have an unmistakable effect on interstate commerce—because of the effect on airborne pollutants. Nothing in *Lopez*, *Jones*, or *Morrison* casts doubt on Congress's power to do so. See *Lopez*, 514 U.S. at 560 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."); *Morrison*, 529 U.S. at 608-609 (similar).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2001

Pet. 22 (arguing that glycols are not volatile). As the court of appeals explained, it is unlikely that EPA erred with respect to specific compounds and, in any event, EPA's regulations provide a mechanism by which erroneously included compounds can be exempted from regulation. Pet. App. 14a-15a.